United States Court of Appeals
for the Second Circuit

APPENDIX

77-7037

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In The

United States Court of Appeals

For The Second Circuit

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NATIONAL AUTO BROKERS CORP., et al.,
Plaintiffs-Appellants,

-against-

GENERAL MOTORS CORPORATION, et al.,
Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York.

JOINT APPENDIX - VOLUME 3

UNITED STATES COURT OF APPEALS
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SECOND CIRCUIT

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establishes that. I only wanted to go over one point or so in the financial matters that were raised and the point about the $55,000.

Q There is some discrepancy about $18,000 which apparently, judging from Mr. Kleinbard's question, hadn't been paid for the benefit of the company. Do you know anything about that?

A Well, we borrowed $55,000 from Fidelity Bank after going to numerous sources and we just couldn't borrow any money, and we finally found someone that would lend us money on my own and my brother's personal assets.

The loan was for $55,000 but there were a couple of items that had to be paid out of that. There was a $4,500 broker's fee. We got it through a broker. We had to pay a $1,500 broker's fee.

There was, I believe, around $2,000 of a debt to Anthony that had to be cleared up. They insisted on it in order that they could place judgments on our properties without any prior judgments. And there was a $1,600 item on my account. There was a legal fee of a thousand dollars. All of that was deducted from the $55,000. And I believe we got a net check of about $45,000.

Q Had any instructions been issued to the accountants with respect to any items that were paid to or for the benefit of your brother?

A Yes. I told Phil that those two items should be deducted from whatever the company owed us, and they were.

MR. PERSON: I think that's all.

THE COURT: Cross-examination, Mr. Kleinbard.

MR. KLEINBARD: Your Honor, I would like to offer in evidence an offering circular that has been previously identified in the answers to plaintiff's interrogatories. This is an offering circular of KABCOR dated January 29, 1971, as amended April 29, 1971. I would like to offer it in evidence. Do you have any objection, Mr. Person?

MR. PERSON: May I see it, please?

(Pause.)

MR. PERSON: No objection.

THE COURT: All right. Received.

xxx (Defendant's Exhibit E for identification received in evidence.)

CROSS-EXAMINATION

BY MR. KLEINBARD:

Q Is it a fact, Mr. Maiorana, that in connection with your offering circular you informed the public that

MABCOR sold relatively few limited production automobiles and in limited production automobiles you included Cadillacs?

A Yes.

Q Let me ask you this: Limited production automobiles are Cadillacs, Mark III's and Corvettes, is that right?

A I don't know whether I said that in the offering circular. Can I see it?

Q Independent of whether it is in the offering circular or not, do you have any disagreement with me on that, that those are limited production automobiles?

A I would say that they could be included in limited production automobiles.

Q They could be. Do you have some doubt about it?

A I don't know what the production of Cadillac is as to, you know, what the needs are. They build about 300,000 cars. I don't know how limited it is.

Q I am talking about what you told Mr. Public.

THE COURT: You have got the statement. Let him see it.

Q I suggest that you take a look at your offering circular which has been marked Defendant's Exhibit E and look at the last sentence of Paragraph 1 under Marketing of New Automobiles.

(Handing.)

A (No response.)

Q Does it say there that "limited production automobiles such as Cadillacs, Mark III's and Corvettes" --

A The last sentence in Paragraph 1?

Q Under the heading, Marketing of New Automobiles, on Page 6.

A (No response.)

Q The next to the last sentence. I'm sorry.

(Pause.)

A I don't see it there.

Q I can't hear you.

THE COURT: Can you point it out to him?

MR. KLEINBARD: Yes, I can even read the sentence.

A I am reading it right here.

Q I am asking you to read here, "The suggested brokerage commission," I want you to read that aloud.

A "The suggested brokerage commission is higher than $200 for limited production automobiles such as Cadillacs, Mark III's and Corvettes." Yes.

Q And then go on reading the rest of that sentence.

A "It involves only about five per cent of the NABCOR system sales amounting to approximately thirty-four automobiles during the past five years."

Q So, for the past five years prior to the offering circular, which is dated January 29, 1971, and amended April 29, 1971, NABCOR sold, of all three makes, thirty-four cars, is that right?

A That's right.

Q And for the year 1970-71 it sold three of all such makes, is that right?

A If that's what it says, I will --

Q And am I correct, Mr. Maiorana, that in all of the calendar year 1972 NABCOR purchased for resale only twelve to fifteen automobiles of any and all makes?

A Yes, that's true. However, we were --

Q Just answer me yes or no. Is it true?

A Yes. I would assume so. I am not looking at the figures. I would assume that --

Q You are assuming that it is true?

A (No response.)

Q Is it true or isn't it true?

A I don't have my records in front of me, Mr. Kleinbard.

Q Were you deposed in this action?

THE COURT: Yes, he was.

Q If I suggested to you at Pages 113 and 114 of the transcript that you said, "Yes," in answer to that question --

A Fine, I will accept that, Mr. Kleinbard.

Q You will accept it?

A Yes.

Q And is it still your testimony that a sudden crisis descended upon you in the automobile aspects of your business because of the alleged transaction with Colonial Cadillac in January and February of 1973?

A Yes.

Q And but for that occurrence, you would have had ample sources of supply and have been doing well in the automobile business, is that your testimony?

A We were always optimistic. We were trying to bui build a business here and it takes time to get a business operation along. We had gone to the U.S. Senate and the Justice Department and we finally started this suit and we were always of the opinion that somewhere along the time we would have gotten some relief and we could start moving in that direction.

Q And the thing that dashed those hopes is the Colonial Cadillac situation in January and February of

A Yes. Being out of money, and this continuing thing, it just became too much. And that's all. We just couldn't continue.

Q Now with respect to the loan --

A -- without relief.

Q -- that you say that you and your brother obtained from Colonial Cadillac, you say you borrowed $100,000, is that correct?

A (No response.)

Q For NABCOR?

A Yes.

Q And $55,000 of it came from Fidelity National Bank?

A Yes.

Q And I believe you testified a minute or two ago that of that approximately forty-some-odd thousand dollars actually went into NABCOR's account.

A Right.

Q And that some of that money went to pay off loans which you and your brother personally owed to Fidelity Bank?

A Some of the difference between the 45 and 55, is that what you are talking about?

Q That's correct.

A Yes. Not that we owed to the Fidelity Bank but that we owed to other people that Fidelity Bank insisted that they be paid off so that they could have first mortgage on our properties.

Q And you say you gave instructions for this to be credited to the amounts due from NABCOR to you and to your brother?

A Yes.

Q And do you know what kind of money we are talking about? Is it $3,700?

A I would say it's about $3,700, yes.

Q And have you ever seen an entry in any of NABCOR's books or records reflecting that credit?

A We don't have those records as yet. Our accountant, after the tax season, will be putting our records together. We have had a lot of problems with records. They were stolen. We didn't have them for six months. They were being reconstructed, and as far as me seeing the entry, no, I didn't see the entry. I assume that it was taken off what was owed to us.

Q And do you recall whether you gave your accountant such an instruction?

A That was in December.

Q Is it your testimony that between December and now you have seen no book entry reflecting that debit that you have just referred to?

A Well, the accountant was Phil --

Q Isn't that a simple question? Can't you answer yes or no?

A These went into his work papers. This is what he told me the company owed us and he gave us the figures and I assumed that they were correct. I haven't seen any entry. I assume that when these records get into book form and general ledgers form or whatever it is, the form that they have to be put into, that this will be reflected.

Q But as of now, between December when you told it to him, and as you are sitting there on the witness stand, you have not seen a book entry reflecting the debit which you just testified to, namely, the $3,700 reduction in the amounts owed by NABCOR to you and your brother?

A No, because I don't know whether that would be put in that way, Mr. Kleinbard. You are asking a question. First of all, there was a $2,100 item and a $1,600 item, and if this was subtracted from what was owed to us, we may -- I may have seen a net figure after that was subtracted. I just can't recall, but I mean to see that [illegible] no, I haven't seen it, Mr. Kleinbard. [illegible] really looked for it, to be perfectly honest [illegible]

Q On the net proceeds that NABCOR received from [illegible] loan, isn't it a fact that some $43,915.00 were paid over to you and your brother, Anthony?

A Yes. We had been lending money to the company from --

Q Can't you just say yes or no? This doesn't require a speech. Was it paid over to you or your brother or wasn't it?

A Yes, there were some monies paid over for monies that we had recently lent to the company and there were some salaries that were owed.

Q For whatever reason.

A Yes.

Q And did they total $43,915.00 out of the [illegible] that was received by NABCOR?

A Yes.

Q [illegible] there were two loans obtained from the [illegible] Bank, is that correct?

A [illegible]

Q [illegible] NABCOR received the proceeds of the [illegible] National Bank, didn't it transfer more than $24,000 thereof to Pocono Futures and Leisure Life?

A Yes. That was for monies that was owed to those companies.

Q Just yes or no, please.

A Yes.

Q We will move along much faster.

And isn't it a fact that the entire proceeds of the second $25,000 received from Provident Bank were paid directly into the bank accounts of Leisure Life and Pocono Futures?

THE COURT: What is the question?

(Record read.)

A Yes.

Q And Pocono Futures and Leisure Life are wholly owned subsidiaries of NABCOR, is that correct?

A Yes.

Q And they are in the land business, is that correct?

A Yes.

Q They don't operate at all in the automobile buisness?

A No, they don't.

Q Now, NABCOR is attempting to get into the land

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business, isn't it?

A Yes, it is.

Q And the fact is that in addition to Pocono Futures and Leisure Life, which are two subsidiaries wholly engaged in the real estate business, NABCOR itself has acquired an option on twenty-three hundred acres in the Poconos known as the Giambotti Tract?

A I want to clarify that, Mr. Kleinbart. It was Pocono Future's option. They turned it over to Leisure Life. In clarifying it, the option was in default. We went and signed a new option with Giambotti for Pocono Futures. However,we put it in the name of National Auto Brokers. It is now going back to Leisure Life where it originally was and belongs.

Q Where it will go tomorrow I don't know, but as of today is the option in the name of NABCOR?

A As of today, we are attempting to get land operations started on that particular tract of land and it's Leisure Life Corporation that is the option holder of that particular option as of today. It's Leisure Life's option.

Q Did NABCOR sign a document recently in which it describes itself as the optionee?

A Yes.

MR. PERSON: I object to this line of questioning. It really makes no difference at all whether a wholly owned subsidiary has priority in it or in the parent. It makes absolutely no difference actually.

THE COURT: Overruled.

BY THE COURT:

Q Do I understand it that out of this entire loan, or set of loans, of $105,000, virtually all of it either was paid to you or your brother or to Pocono Futures or Leisure Life?

A No, that's not so, Your Honor. I don't know how these figures are working out but we had lent the company money.

Q Well, I understand your testimony that there were prior loans, but I am just getting to these particular amounts of cash. After these borrowings, the money was almost all -- let's start with the $55,000. It was all used to pay either obligations or yours or your brothers, or to pay you and your brother directly, or to pay fees for getting the loan, isn't that basically it?

A Just about, Your Honor, but that's just not the way it was.

Q The explanation being that you had some loans that you had made to the company which were being paid back, is that what you are saying?

A No. You see, we applied on this loan from Fidelity in October. It took almost three months to get it. In the meantime I sold a valuable property, a swim club. The proceeds of that I put in. And Anthony put in about $10,000. I borrowed $4,000 from my boy. I took $2,000 that I had from the swim club and we put all of this money in.

Q How much from the swim club?

A $13,500 in cash.

These were monies that were accumulated. We hadn't been paid since about June. My attorney in Scranton told me, he said, "Frank, what you should do is make bank borrowings." He said, "Borrow the money from the bank, pay yourself, then get certificates of deposit, and even if you, instead of putting the money in, give the bank a certificate of deposit and make a fight which I did in the two cases. $50,000 in series of deposits are tied up with Provident Bank.

Q Let's go back. The Provident Bank money was used for Leisure Life and Pocono Futures, right?

A Yes, but Pocono Futures --

Q I want you to direct your attention to the Fidelity.

A It's not giving a true picture, Your Honor, this is why. This is a total capitalization.

Q Excuse me, please. You got about -- you borrowed $55,000 from Fidelity, right?

A That's right.

Q Now, a certain amount was used for brokerage fee, legal expenses, and so forth?

A Right.

Q Then $3,700 was used to pay some debts of yours and your brother's, right?

A This the bank deducted at the settlement, yes.

Q To pay debts of yours and your brother's, am I right?

A Yes, Your Honor.

Q And $43,915.00 was paid directly to you and your brother out of that, right?

A Yes.

Q And you are saying that in that period shortly before this loan -- when was this loan made from the Fidelity Bank?

A We started negotiating the loan --

Q When was it consummated?

A December 19th.

Q All right. December 19th.

A Yes.

Q Now, let's take the period from October to December. Had you and your brother or either of you, from any source, I mean whether you sold a swimming pool or what, had you put cash in or loaned money to NABCOR?

A Yes.

Q And how much? Just please give me a total.

A I really can't give you a total.

Q You mentioned $13,000.

A $13,000 from the swim club that was put in.

Q And what else?

A I borrowed $3,300 from my boy.

$2,000 that was in the swim club account.

Tony had $10,000 at that time.

Q Who is Tony, your brother?

A My brother, yes.

Q Well, in other words, you loaned or you have given me the amounts of loans that you made to NABCOR in October?

A They were either loans directly to NABCOR or used for NABCOR's purposes at that time. The company was in a period of some turmoil. We were -- I was up in the mountains in the land business. I was paying out checks out of my own checkbook.

Q You mean for land operations?

A Or for automobiles for that matter. Whatever expenses were being incurred we were writing checks right out of our own checkbooks.

Q Do you know how much money -- you are bringing this motion --

A I would say $20,000 or $30,000, Your Honor.

Q That you and your brother loaned or advanced to NABCOR during the October to December period?

A About $20,000.

Q About $20,000 to $30,000, but you don't know how much for sure?

A I am not sure.

THE COURT: All right, Mr. Kleinbard.

Q Isn't it a fact, Mr. Maiorana, that you and your brother, as far as loans on the books are concerned, loaned $100 on October 12, $2300 on October 30, $3116 on November 24, and that is it in 19-- from October 1, 1972 to the end of 1972?

THE COURT: What is the total of that?

MR. KLEINBARD: I'm sorry. I will have to do it.

THE COURT: Just approximately.

MR. KLEINBARD: According to me that is $5,716.

THE COURT: All right.

Now what is the question?

Q I am asking the witness whether it isn't a fact that he and his brother, as far as loans recorded on the books of NABCOR are concerned loaned no more than $5,716 during the period October through December 1972.

A You are sepaking of loans made -- moneys put in the bank and checks drawn from the bank--

THE COURT: Speaking of loans on the books of the company.

Q As distinguished from payments that you may have made to third parties or whatever.

A I guess so. You are looking at the records at this point.

Q And isn't it a fact that from August 1, 1972 to March 8 of 1973 you and your brother took out $22,728 by way of salary from NABCOR?

A If that is what the records reflect, I guess that is so.

THE COURT: What are those dates?

MR.KLEINBARD: Between August 1, 1972 to March 8, 1973.

THE COURT: And what was the figure, please?

MR. KLEINBARD: I'm sorry. $22,728.

Q Now, we were discussing NABCOR's activities in the land business when we got off on this, Mr.Mairana.

Is it also true that NABCOR had acquired an additional 525 acres in the Poconos from Aleta Development Corporation in the latter part of 1972?

A Yes.

Q Now, when NABCOR obtained its $5,000 loan from Fidelity Bank, did you tell the bank that the purpose of the loan was to obtain operating capital for NABCOR?

A Yes. It was for business purposes.

Q Well, did you tell them it was for operating capital?

A For business purposes.

Q And did you tell them-- you didn't tell them that it was for the automobile business, did you?

A They were aware that we were in the automobile business and the land business.

THE COURT: The question is what did you tell them?

A What the loan was for? Just for business purposes, your Honor.

THE COURT: Okay.

THE WITNESS: They said that they really were not concerned about the company itself. They were lending the money to us personally and we were responsible for it.

Q I am asking you about what you told them, not what they told you.

THE COURT: Do you have a document?

MR. KLEINBARD: Yes, I do.

THE COURT: All right. Show it to him.

Let's have it marked.

Q I show you a small business loan application to which are annexed guarantees and ask you if this is an application which you made to the Fidelity Bank and guarantees which you and your wife and your brother and his wife executed in connection therewith.

xx Defendant's Exhibit F marked for identification.)

MR. PERSON: May I see it, please?

MR. KLEINBARD: It was produced by you, Mr. Person.

(Pause.)

MR. KLEINBARD: I am offering it in evidence.

MR. PERSON: No objection, your Honor.

THE COURT: All right.

Received.

xx (Defendant's Exhibit F received in evidence.)

Q I direct your attention to the portion of the application which says "Kind of Business" and to the answer "Selling homesites in the Poconos."

I ask you if that isn't what you told the Fidelity Bank was the purpose of the loan.

THE COURT: It is in evidence, isn't it?

May I see it?

MR. KLEINBARD: Yes, surely.

THE WITNESS: Your Honor, most of these--

THE COURT: Excuse me. I just want to see it for a minute.

(Pause.)

THE COURT: All right. Let's go on. I have the exhibit.

MR. KLEINBARD: Your Honor also has before you, and I will not take the trouble to read or comment about it, the Spector pro forma balance sheets so, in the interest of time, I will move on because they are in evidence, your Honor.

THE COURT: All right.

Q Do you recall how much NABCOR paid for the Giambetti option?

A I believe we paid a total of $9,000.

Q And that was around the fall of 1972?

A No. There was a $3000 payment in June. I think we paid one in August, and then I paid another one in November.

THE COURT: We are now in our third hour.

MR. KLEINBARD: I'm sorry, your Honor. I am doing the best I can. I have occupied a very small portion of those three hours.

Q I would like to ask you, did you get into a litigation in connection with your acquisition of the Alita tract?

A Yes. We sued for specific performance.

Q And prior to having sued for specific performance, then a wholly-owned subsidiary of North American Land Development Corporation, did you spend about 40 or $50,000 in developing that tract?

A Can I hear the question again, sir?

(Question read.)

A I don't have the records before me, but we spent a considerable amount of money; yes.

Q You don't disagree with that figure, do you, 40 or $50,000? Isn't that what you testified to at your deposition?

A I would say so. I wasn't sure at the deposition either. That's a figure that comes into my mind.

Q Is it between 40 and $50,000?

A I would assume so.

MR. KLEINBARD: Your Honor, I would like to offer in evidence the pleadings in that action, in the NABCOR action against Alita Development Corporation.

THE COURT: What is the point of this?

MR. KLEINBARD: To show your Honor that part of the present financial condition of NABCOR was brought about as a result of its involvement in land transactions and--

THE COURT: Any objection to these pleadings?

MR. PERSON: Your Honor, we have already testified that there was a net cash flow. Why can't this be directed to challenging that rather than these specifics which aren't being tied up at all?

THE COURT: I don't know what the time is. What has led to the financial problems? What has happened in that transaction which has led to financial problems? I don't understand it.

MR. KLEINBARD: Well, here is a situation where NABCOR or its subsidiary has spent 40 to $50,000 in developing a tract. That tract is now in litigation. NABCOR doesn't have the benefit of that tract. There is a lawsuit.

At the moment that money has been spent and is producing no particular income. That is not my fault.

MR. PERSON: This is speculative.

MR. KLEINBARD: What do you mean it is speculative? There is no issue about the litigation, and there is no issue that they spent the money.

THE COURT: I will take it for what it is worth. Any objection to that? Do you have an objection?

MR. PERSON: No, your Honor.

THE COURT: All right. We will receive it.

MR. KLEINBARD: Mark them as one exhibit, if your Honor wants to, or three. There are three sets of pleadings.

THE COURT: One exhibit.

MR. KLEINBARD: They spell out the transaction. I am trying not to take the time of the court.

(Defendant's Exhibit G for identification received in evidence.)

MR. KLEINBARD: May I just read one paragraph, your Honor.

THE COURT: I will have the exhibit.

MR. KLEINBARD: All right.

THE COURT: What else do you have?

MR. KLEINBARD: Just one second, your Honor, and I will be right with you.

(Pause.)

THE COURT: Show me the paragraph you wanted to read and I will just read it to myself.

MR. KLEINBARD: All right, your Honor.

MR. KAPLAN: Your Honor, paragraphs 1 and 2 on this page (Handing).

Q In connection with your automobile business, Mr. Maiorana, does your organization distribute a bulletin called MABCOR Marketing and Administration Manual?

A Yes.

Q And it does so at the present time right up until today?

A I don't believe we are issuing those any more.

Q When did you stop?

A I don't recall. It's been--Mike O'Brien tells me that he hasn't issued the bulletin in some time.

THE COURT: Issued what?

THE WITNESS: This marketing pamphlet that we had, your Honor.

MR. KLEINBARD: Can I mark this for identification, your Honor? It's already been marked as Exhibit 40 on Mr. Maiorana's deposition.

THE COURT: Yes.

(Marked Defendant's Exhibit H for identification.)

Q Do you recall testifying on your examination before trial on March 30th?

A (No response.)

Q Were you--

THE COURT: If the record shows it, of course he was.

Q And were you asked this question and did you give this answer:

"Q Are exhibits 39, 40"--referring to Defendant's Exhibit H for identification--"and 41 still in use by NABCOR?

"A Yes."

Do you recall being asked that question and giving that answer?

A I don't really recall.

Q Beg your pardon?

A I don't really recall.

Q I show it to you and ask you if that refreshes your recollection, or do you want to change your testimony?

A That might have been a misunderstanding.

As I said, Mike O'Brien said that he doesn't really give out these materials any more.

MR. KLEINBARD: I object and move to strike what Mr. O'Brien said.

Q Did you make those statements?

A I probably misunderstood. But I made them.

THE COURT: All right. Go ahead.

MR. KLEINBARD: I am just trying to find the page, your Honor.

(Pause.)

MR. KLEINBARD: I offer Defendant's Exhibit H for identification in evidence, your Honor.

THE COURT: Any objection?

MR. FERSON: No objection, your Honor.

(Defendants Exhibit H for identification received in evidence.)

MR. KLEINBARD: I will just read a bit.

"In our fourth year of operation NABCOR has experienced no difficulty in supplying its brokers with automobiles nor does it anticipate any difficulty in the future, so there is no reason to worry about that particular point."

THE COURT: What is the date of that?

MR. KLEINBARD: This thing is dated in 1969.

THE COURT: All right, let's go on.

MR. KLEINBARD: And he said it is still inu se. That was the point, your Honor.

THE COURT: All right, go ahead.

MR. KLEINBARD: I have no other questions.

number sold?

A Definitely.

Q What was the reason for the non-delivery of automobiles that had been ordered through the NABCOR system, if you can generalize?

A We got stopped, first in 1966 when our Cadillacs primarily got stopped, and we then, with the difficulties we were having getting Cadillacs, more or less told our brokers that limited production cars we would only deliver only as a special favor to some special account of theirs, but there was a period of time when we told them that we wouldn't even deliver, you know, only a few of these special order cars, Cadillacs, or Corvettes and Mark IIIs, and we were getting a lot of requests for them but a lot of them we just didn't even bother to put through because we were running into too many problems.

Q Were loans made by you or your brother personally to either of the NABCOR subsidiaries?

A Yes. Since those loans were made in December and January, we have put back another twenty or $30,000 into NABCOR and subsidiaries.

Q Were these loans mentioned at all during the examination by Mr. Kleinbard?

A No, they were not.

Q Were there any loans by the subsidiaries upstream to the parent or were there any payments made for the benefi of the parent?

A Yes; many.

Q Were these transactions reflected in the questions by Mr. Kleinbard?

A No.

Q Can you give us, in your opinion, approximately how much in the aggregate you and your brother have advanced or loaned to NABCOR since October 1, 1972 after deducting the amounts paid to you except for salaries?

MR. KLEINBARD: I object.

A He either has information or he doesn't.

Q Have you discussed this matter with your accountant?

THE COURT: I assume you would know what you loaned. That isn't a matter of opinion or discussing it with your accountant.

THE WITNESS: I said I loaned approximately $100,000, your Honor.

THE COURT: Since when?

THE WITNESS: In that whole period since the October period.

THE COURT: October to the present?

MALVERN J. GROSS, called as a witness by the Defendant, being first duly sworn, testified as follows:

THE COURT: Those exhibits are received.

xxx (Defendants' Exhibits I through O for identification received in evidence.)

DIRECT EXAMINATION

BY MR. KLEINBARD:

Q Mr. Gross, what is your occupation?

A I am a certified public accountant.

Q Are you affiliated with any accounting firm?

A Yes. I am a partner at Price Waterhouse & Company.

Q And you have been with Price Waterhouse since 1954?

A That's correct.

Q And a partner since June 30, 1969?

A That's correct.

Q Is there some particular area of accounting in which you have devoted a good deal of your time?

A Yes. Since 1963 I have been associated on a full time basis with our small business department in New York.

As such, I have been responsible for handling the accounting and auditing problems of many small businesses the size of NABCOR, probably about 200 in number.

A number of these clients have had registration statements. Most of them have had Regulations A offerings similar to NABCOR.

Q And have you been retained by us in connection with this litigation?

A Yes, I have.

Q Do you expect to be compensated for your work?

A Yes, I do.

Q Is your compensation in any way contingent upon the outcome?

A No.

Q Could you explain what you were retained to do by us in this matter?

A Yes. You asked us to examine certain photocopies of records which you had obtained relating to Pocono, Leisure and NABCOR.

You asked us to make an analysis of these records to provide you with summaries of our -- from these records and to also provide expert advice in connection with some of the depositions that you were taking.

Q Did you examine the records which have just been marked Defendants' Exhibits I through O?

A Yes.

Q I show you a document and ask you whether that is one of the reports which you prepared for us entitled, "Summary of Loan Intercompany and Maiorana Transactions December 1972 to January 3, 1973."

A Yes, I prepared this at your request. It shows the transactions between the Maioranas, the loan transactions with the various subsidiaries and with outsiders during this period.

The first page is a summary of the activity. The second page is a detailed chronological list of all transactions showing the details of each disbursement.

MR. KLEINBARD: I offer the exhibit, your Honor.

THE COURT: It is already in evidence.

MR. KLEINBARD: No, no. I am offering the exhibit that Mr. Gross prepared.

THE COURT: Oh, I see. All right. You may have that marked.

Is there any objection to this summary?

MR. PERSON: I would like to limit it. I think we can't accept it for what it says. I mean, we would have to be able to know more about how these figures were prepared. I don't know exactly what documents they refer to in compiling this so that we don't have any idea --

THE COURT: The question is do you object or do you want voir dire or what do you want to do? I would like to inquire somewhat about this.

MR. KLEINBARD: I have no objection but I did state that the witness was given the Defendants' Exhibits I through O and it is on the basis of those exhibits, and those exhibits only, which he has prepared these reports.

THE COURT: That was this witness' testimony?

MR. PERSON: Yes. I have no idea if I through O constitutes all of the records which have been produced by us.

MR. KLEINBARD: I make that representation. They are all the financial records that you have given us. There are some which we have not gotten.

THE COURT: Are you aware of these documents that we are calling Exhibits I through O?

THE WITNESS: Yes, I am.

THE COURT: As far as your work in preparing this summary, was it limited solely to figures that you obtained from Exhibits I through O?

THE WITNESS: That's correct, as relates to this particular exhibit.

THE COURT: All right. That's all we are talking about now.

MR. PERSON: Your Honor, these figures do not cover at all the period for which we've had testimony. It is a very abbreviated period.

MR. KLEINBARD: I understand. He will explain that.

THE COURT: That is not a ground of objection. I am going to receive this.

This will be Exhibit P.

(Defendants' Exhibit P for identification received in evidence.)

xxx THE COURT: All right, Mr. Kleinbard.

BY MR. KLEINBARD:

Q Could you explain, Mr. Gross, for us why this report picked the period December 1972 to January 31, 1973?

A Certainly. December 19th was the date on which the first of these three loans were made, the one to Fidelity. January 31st was the end of the NABCOR fiscal year and obviously was a natural point to stop.

Q Can you just, in a sentence or two, give us the substance of what Defendants' Exhibit P shows?

THE COURT: Mr. Kleinbard, I have it and I can read it.

MR. KLEINBARD: All right. Fine.

Q Did you prepare, at my request, a summary of NABCOR transactions with the Maioranas for the period August 1, 1972 to March 8, 1973, a broader period?

A Yes, I did.

Q And is this a copy of the report which you prepared?

A Yes, it is.

THE COURT: Do you offer this?

MR. KLEINBARD: I am going to offer that in evidence, your Honor.

THE COURT: Any objection?

MR. PERSON: Subject to the same representations.

MR. KLEINBARD: Well, I should point out that there are two footnotes here which indicate that in two places deposition testimony was used in addition to the records, and that's so identified in the report, your Honor.

THE COURT: Received.

(Defendants' Exhibit Q for identification received in evidence.)

xxx

Q Did you also at my request prepare a summary of NABCOR's transactions with the Maioranas and its subsidiaries, Pocono and Leisure, for the period August 1, '75 to March 8, 1973?

BEST COPY AVAILABLE

A Yes, I did.

Q And is what I show you the results of your preparation pursuant to my request?

A Yes.

Q And was this document prepared on the basis of Defendants' Exhibits I through O and with the addition of one or two references to transcripts of testimony which are reflected in the report?

A That is correct.

MR. KLEINBARD: I offer it in evidence.

THE COURT: Received.

(Defendants' Exhibit R for identification received in evidence.)

xxx Q And finally I show you a report entitled "Summary of NABCOR Cash Receipts and Disbursements for the period August 1, 1972 to March 8, 1972," and I ask you whether you prepared that report at my request.

A Yes, I did.

Q Was it prepared on the basis of the same information except where qualified by footnotes?

A That is correct.

MR. KLEINBARD: I offer it, your Honor.

THE COURT: Received.

xxx (Defendants' Exhibit S for identification received in evidence.)

MR. KLEINBARD: Just one second, your Honor.

(Pause)

Q May I just ask you this, Mr. Gross: Based on your examination of the NABCOR cash receipts and disbursements, do you have an opinion as to its relative cash position on August 1, 1972 as opposed to its cash position on March 8, 1973?

A Yes, I do.

Q Can you tell us what that opinion is?

A It is my opinion that there is no substantial difference in the cash position at the beginning and at the end of this period.

Q Does Defendants' Exhibit S summarize the monthly loans from the Maioranas to NABCOR month by month during the period August 1, 1972 through March 8, 1972?

A Yes, it does.

Q And can you just give me what the bottom line is on that?

A I wonder if I could have that exhibit back. It is being marked.

THE COURT: Which exhibit are you talking about?

MR. KLEINBARD: S, your Honor.

THE WITNESS: Would you repeat the question, please?

Q What I wanted to know was what were the total loans from the Maioranas to NABCOR in the period October 1, 1972 through March 8, 1973?

A You want to know the loans to and loans from during this period?

Q No. I want to know the loans from.

THE COURT: From October 1st.

MR. KLEINBARD: 1972 through March 8, 1973. I believe it is on the first page.

A Yes. This first page shows that the loans from the Maioranas was aggregated $23,752.

Q During that period.

A During this period.

Q Now, have you had the opportunity to examine a general journal of NABCOR's?

A No, I have n ot.

Q Would the availability of a general journal change the schedule which you have prepared as Exhibit S?

A No, it would not.

Q Will you explain why not?

A A general journal is a book in which only non-cash transactions are entered. This exhibit is solely an exhibit showing cash transactions.

MR. KLEINBARD: I have no further questions.

BY THE COURT:

Q Looking at Exhibit S -- may I ask you this? -- there is a heading on the first page called Transactions with the Maioranas. Now, according to the records you looked at, are these all the transactions between NABCOR and the Maioranas?

A These are all of the cash transactions, yes.

Q Now, this is with NABCOR itself?

A With NABCOR itself.

Q Were there any cash transactions directly with either of the subsidiaries that you found?

A Yes. And this can be --

Q Where would they be shown?

A This can be seen in the first exhibit, Exhibit P. It should be noted that we didn't have records for either of the subsidiaries prior to January 1, 1973, so we had no knowledge of anything happening before that date.

On the second page of Exhibit P are all of the transactions in the month of January with the Maioranas and the subsidiaries and NABCOR.

Q My question was: Were there any cash transactions directly between the Maioranas and the subsidiaries?

A Yes, there were.

Q What were they?

A In the middle of that second page, under the date January 5th there were payments to Frank and Anthony of six thousand, of five thousand from Pocono and seven thousand and five thousand from Leisure.

Q Just give me a total, if you don't mind.

A Between the two companies and the two brothers, a total of $23,000 payment to them.

Q Any payments by them?

A There were no payments on January 5th.

On January 19th there were two more payments to the Maioranas totalling $12,004 --

Q Wait a minute. I'm sorry.

MR. KLEINBARD: His Honor asked --

Q January 5th was 23,000 from the subjects to the Maioranas?

A Yes.

MR. KLEINBARD: The process continued, your Honor. I think that's what the witness is trying to say.

Q On January 19th there was another twelve thousand, right?

A That's correct.

Q Totalling thirty five, right?

A That's correct.

Q Now, you have loans from Frank, but that's to NABCOR, right?

A That's correct.

Q So there are no payments noted from the Maioranas to the subjects directly, right?

A That's correct.

MR. KLEINBARD: I think, your Honor, that is due to the fact that we've no books prior to the month of January 1973. I have no way of knowing what happened prior to that time.

THE COURT: But just according to the figures and these documents?

MR. KLEINBARD: That's right, your Honor, and that's all that has been made available to you.

I have no further questions, your Honor.

THE COURT: Do you have any cross?

MR. PERSON: Yes.

CROSS EXAMINATION

BY MR. PERSON:

Q Mr. Gross, were you requested to provide any information about the transactions between the Maiorana brothers which created obligations on their part as distinct from cash transactions?

A Would you repeat the question, please?

Q Were you requested to provide, in your summaries, any information about transactions in which the Maiorana brothers, either one of them, had incurred obligations, personal obligations, with respect to cash items received by NABCOR?

A We were not instructed on this question. We dealt solely with the books that we were referring to here as exhibits.

Q Isn't that a little bit misleading then with respect to the picture if you are purporting to have all of the transactions between the Maiorana brothers and NABCOR and the subsidiary companies? Wouldn't it be appropriate to at least footnote that under generally accepted accounting principles?

A I have no firsthand knowledge, not having looked at the Maioranas' personal books, as to whether there were such transactions.

MR. PERSON: These financials are highly suspect --

THE COURT: We don't need to argue.

MR. PERSON: I think that our own financials will reflect the accurate financial status. These leave out most of the parts of the transactions, personal obligations incurred by them.

THE COURT: Do you have any further questions of this witness?

Q Did you include in these financials advances that were made for the benefit of NABCOR but which were not cash items received by NABCOR or either subsidiary?

A If they were not reflected as a cash transaction in the records, they are not reflected here.

MR. PERSON: We can't accept those financials, your Honor.

I have no further questions.

THE COURT: All right. Do you have any further questions?

MR. KLEINBARD: Just one question.

REDIRECT EXAMINATION

BY MR. KLEINBARD:

Q Were any other records made available to you or are you aware of any other records being available?

A Not records as such. I am aware --

Q Did Mr. Maiorana and his brother make available to you their personal financial records?

A No, they didn't.

MR. PERSON: One question.

RECROSS EXAMINATION

BY MR. PERSON:

Q Did anyone ask you to read the depositions, the transcripts of the depositions in which these transactions had been quite carefully detailed?

MR. KLEINBARD: I object to that. I object to the form of the question.

THE COURT: Were you asked to read the depositions?

Q Did you incorporate the information contained in the transcripts in your summaries or did you edit and leave some information out?

A No. I read the transcript for the session in which I was in attendance and for that afternoon session.

Q You don't know if you have all of the transcripts, then, that pertain to the financial transactions?

A That is correct.

MR. PERSON: Okay. Thank you.

THE COURT: Do you have any other witnesses?

MR. KLEINBARD: No, your Honor.

THE COURT: All right. You may step down.

(Witness excused)

THE COURT: Let me put a short statement of my decision on this motion on the record right now.

This action was commenced on December 10, 1970. The principal plaintiff is National Auto Brokers Corporation, known as NABCOR, which was and is in the business of buying and selling cars.

NABCOR claims that it developed the concept under which it would act as agent for the individual consumer and would provide the individual consumer with the "buying power" of large fleet purchasers, thus providing savings to the consumers and certain additional services which a consumer would not normally have when going to a regular auto agency. NABCOR claims that it had established a system of brokers through which this business was carried out.

The action is brought as a class action on behalf of these brokers and other alleged classes. The claims herein include the claim that the leading American auto manufacturers and others conspired to drive NABCOR out of its business.

Almost two and a half years have passed since the commencement of this action without really going beyond the preliminary stages of the litigation. For instance, no motion has yet been made under Rule 23 to declare this a class action and send a notice to the class or classes.

In order to obtain some reasonable progress in the litigation, this Court, in February of this year, directed that discovery go forward immediately on all issues, both on the issues related to the propriety of class action treatment and also on the merits. There was a direction that the class action motion be made on a date specified.

A deposition schedule was worked out. The initial depositions under this schedule were to be taken by the defendants and a series of depositions was scheduled to commence March 12th.

On March 5, 1973, the plaintiff served a notice of motion for a preliminary injunction. The defendants, in a conference held with this Court on the record on March 8th, contended that this injunction motion was a subterfuge to effectively abort or frustrate the deposition schedule.

The defendants pointed out that most of the alleged wrongful acts giving rise to the claim for injunctive relief occurred, according to plaintiffs' papers, in the years 1966, 1967, 1968 and 1970, before the lawsuit was started. Defendants pointed to the fact that no request was made for preliminary injunction until the present time, on the very eve of the scheduled depositions.

At the hearing of March 8th there was a discussion of how the motion for a preliminary injunction could be handled with minimum interference to the deposition schedule. NABCOR urged that the motion was being brought at the present time because NABCOR was about to be driven out of its business by virtue of illegal acts on the part of the defendants.

NABCOR urged that its supply of Cadillac automobiles had been cut off late in February and that this cutoff had been caused by the Cadillac Company, manifested in a refusal by a Cadillac dealer named Colonial Cadillac of Trenton, New Jersey to sell cars to NABCOR.

It was agreed by the parties, with the consent of the Court, that the motion for a preliminary injunction would be limited to the question of whether Colonial Cadillac's alleged refusal to deal with NABCOR in February 1973 was the result of illegal activity on the part of General Motors.

An evidentiary hearing was held on the evening of March 19th, at which time the motion was adjourned until today, April 10th.

On the basis of the record on this motion, I hold that the motion for a preliminary injunction should be denied. I find that plaintiff has adduced no persuasive evidence indicating that Colonial Cadillac refused to deal with NABCOR or cut off NABCOR's supply of automobiles as a result of any illegal activity on the part of General Motors or any other defendant.

The facts about the Colonial Cadillac transaction are basically these:

In the fall of 1972 a representative of NABCOR had discussions with Colonial Cadillac relating to the possible purchase of Cadillacs by NABCOR for $550 above Colonial's price from General Motors. Any extras, such as finishing or extra equipment, would be added to this. But basically the price was to be $550 above Colonial's price.

The NABCOR representative, a Mr. O'Brien, placed an order for one yellow Cadillac of a certain variety in late October 1972. According to Mr. O'Brien, it was specified that the customer of NABCOR wished to have this yellow Cadillac before Christmas time and delivery was requested to fulfill that wish.

According to a Mr. Murray, vice president of Colonial Cadillac, a deposit was requested from NABCOR. Mr. O'Brien denies that there was a request for a deposit at the time of the initial order. This discrepancy is not material The record shows that the Cadillac was ordered by Colonial from General Motors and that there was no objection whatever to dealing with NABCOR. The price was to be the $550 over Colonial's invoice, in accordance with the original discussion.

The Cadillac arrived at Colonial too late for delivery to NABCOR before Christmas. The apparent result of this was that NABCOR had objections from its customer and NABCOR did not pick up that Cadillac for a substantial period of time, indeed until the middle of February.

In the meantime Colonial was concerned about having a car on its hands which was delayed in delivery to its customer and was concerned that NABCOR might simply not take the car at all. There were telephone calls to NABCOR requesting NABCOR to take delivery, and NABCOR was advised that the car would be made available for sale to the general public if NABCOR did not pick up the car promptly.

After various discussions, as already noted the car was picked up by NABCOR in the middle of February of 1973. Shortly before delivery, a deposit was made by NABCOR, full payment was duly made, and the price was the $550 above Colonial Cadillac's cost plus the cost of extras.

At about the time that NABCOR picked up this yellow Cadillac, it attempted to place orders for two additional cars with Colonial Cadillac. Colonial regarded the first transaction, the one involving the yellow Cadillac, as somewhat of a fiasco because of the long delay in NABCOR taking delivery.

The testimony by the representatives of Colonial Cadillac who have testified at this proceeding is that Colonial refused to process these two additional orders which NABCOR attempted to place. Their testimony is that the reason for refusing to take this business was the difficulty had with NABCOR with respect to the delivery of the first car.

I find as a fact that this was the reason for Colonial's refusal to do further business at this time with NABCOR.

There is no evidence, and indeed there are specific denials both by Colonial and by General Motors, as to any activity on the part of General Motors resulting in Colonial's refusal to take additional business from NABCOR. There is no evidence whatever to indicate that General Motors communicated with Colonial Cadillac or took any action designed to prevent Colonial from dealing on this occasion with NABCOR. What the evidence shows is a misunderstanding between Colonial Cadillac and NABCOR.

There may be a question as to whether Colonial was or was not justified in its attitude towards NABCOR as to NABCOR being a good and reliable customer, but this is a matter between NABCOR and Colonial. It is a matter relating to the discussions and dealings between those two parties about delivery dates, excuses for not taking delivery, and so forth. According to the evidence on this record, this problem is not a matter traceable to General

Motors or to any illegal act on the part of General Motors.

NABCOR makes certain contentions which I will now deal with briefly.

First, NABCOR contends that Colonial Cadillac, like other General Motors dealers, was limited geographically with respect to the area in which Colonial could sell. The contention is that some device was used in connection with the registration of the yellow Cadillac designed to get around this geographical restriction.

Whether or not such geographical restriction is or is not an antitrust problem I do not pass upon on this motion. The fact is that there is no showing that this geographical restriction prevented NABCOR from obtaining any cars from Colonial Cadillac on the occasion in question.

A broader contention of NABCOR on this motion deals with the question of fleet allotments and fleet certificates. The evidence indicates that the production of Cadillac automobiles has, in general, been insufficient to meet the demand, resulting in a system of allotments by the Cadillac Company to its geographical zones and then an allotment by the zones to indivual dealers.

The testimony shows the system for making these allotments, and you need to go into that in detail. But, basically, there are two kinds of allotments which have been discussed. The first is a socalled retail allotment. This is the regular allotment to Cadillac dealers to sell to their normal customers. The second type of allotment is called a fleet allotment. This arises from the fact that large purchasers of automobiles, such as Hertz or Avis or a governmental entity or a large business, may buy many more Cadillacs and other General Motors cars than the normal consumer.

A system has been worked out to add to a dealer's allotment so that that dealer may sell to the socalled fleet purchasers. Generally, the customer applies to General Motors, apparently through the dealer, for a fleet allotment. The allotment then is made to the dealer for the specific customer.

Apparently something called a fleet certificate is on occasion given to certain fleet purchasers, and that fleet certificate conveys certain benefits. Admittedly, NABCOR was not entitled to a fleet certificate, nor was NABCOR entitled to a fleet allotment.

The evidence indicates that companies who resell cars do not obtain fleet certificates or fleet allotments. NABCOR contends in this action that the failure to make fleet certificates and fleet allotments available to NABCOR involves an illegal deprivation or hindrance to NABCOR in obtaining automobiles at the prices and under the conditions which NABCOR sought to obtain.

These issues about the validity of fleet treatment or the refusal to give fleet treatment to NABCOR go to the basic merits of the case, and I am not at this time making any decision on those questions.

For the sake of this motion it is sufficient to say that there is no showing whatever that the fleet certificate problem, or the fleet allotment problem, had anything to do with Colonial Cadillac selling or not selling automobiles to NABCOR at the time with which we are dealing on this motion, namely late 1972 and early 1973. NABCOR was not prevented from ordering and receiving the yellow Cadillac because of any problem about fleet certificates or fleet allotments.

Any inference which could be drawn from the general practices of General Motors with respect to fleet certificates and fleet allotments is destroyed by the fact that NABCOR did order the single Cadillac in the fall of 1972 and received that automobile.

As far as the refusal to sell further cars to NABCOR occurring in early 1973, I have already dealt with the evidence on that question.

I find it significant that Mr. O'Brien, the

NABCOR representative in the Colonial Cadillac transactions, testified at this hearing and was specifically asked by NABCOR's counsel the following question:

"Q When you placed these orders with Mr. Murray, had you indicated to Mr. Murray that these were orders being placed on a fleet basis?

"A No, I didn't."

This Mr. Murray was the vice president of Colonial Cadillac referred to earlier. These orders are the orders in late 1972 and early 1973 about which we have dealt in this opinion.

I believe that what I have set forth here is sufficient to dispose of the motion for a preliminary injunction. The motion was handled within the limits agreed upon, those limits being that the motion would relate solely to the question of the reason for the refusals by Colonial Cadillac to do certain business in early 1973. Under these ground rules which have governed the handling of the present motion, the present motion must be denied. I would note certain other things, however.

At the hearing of March 8, 1973, Mr. Frank Maiorana, in urging the necessity for an immediate hearing on a motion for a preliminary injunction, indicated that the Colonial Cadillac matter, which had occurred a mere week or so before the hearing, had created a crisis in his company which would put his company out of business or which threatened to do so.

I asked Mr. Maiorana and his counsel why it was that the motion was being brought at this particular time and had not been brought earlier, when most of the alleged illegal activity was taking place. The answer was that the NABCOR business had taken a desperate turn in the fall of 1972 which was relieved only by the infusion by Mr. Maiorana and his brother of a hundred thousand dollars into the company.

This one hundred thousand dollars, according to Mr. Maiorana, had, by the time of the motion, just about been exhausted. This exhaustion of funds together with the cutoff of automobile supplies was, according to Mr. Maiorana, driving NABCOR out of business. Mr. Maiorana was present personally at that hearing and made representations personally to the Court.

I find that those representations were misleading. The evidence as developed at this hearing shows certain material facts which were n ot indicated to me by Mr. Maiorana.

First, the facts show that a substantial part of the business of NABCOR at the present time is the land business in the Pocono Mountains and perhaps elsewhere. The auto business of NABCOR has apparently been at a very low level for months or even a year or more. NABCOR has turned to the land business as a way to supplement the low level of earnings of the auto business.

The testimony of the accountant put on the stand by NABCOR is that the land business has generated sufficient cash flow to keep NABCOR alive. It would appear that the financial condition of NABCOR is somewhat better now than before the land business was started a few months ago, although all things being relative the condition may not be perfectly healthy now.

In other words, it is impossible to find that a crisis has been presented to NABCOR by virtue of anything connected with Colonial Cadillac happening in the very recent past. Whatever problems exist at NABCOR, and whatever the sources of those problems, they simply did not suddenly occur within the last month or two, as represented to me by Mr. Maiorana on March 8th.

At page 12 of the March 8th hearing Mr. Maiorana stated that the one hundred thousand dollars which he and his brother had put into the company had been spent for normal expenses. Mr. Maiorana gave a somewhat different version two pages later, when he said that it was necessary to put the money in to pay a lot of existing debts.

The overall effect of the statements about the one hundred thousand dollars at the March 8th hearing was highly misleading. The financial records of NABCOR are apparently not such as to permit a complete accounting of the transactions involving the Maiorana brothers, NABCOR and NABCOR's subsidiaries, but on the basis of the records and the testimony which have been made available in this hearing it appears quite certain that this one hundred thousand dollars spoken of by Mr. Maiorana was not even in major part used for the expenses of NABCOR and was probably not used to pay off NABCOR's obligations, as later indicated in that March 8th hearing.

The fact is, according to the available records, that there was a $55,000 loan from the Fidelity National Bank and that almost all of that $55,000, made December 19, 1972, went to pay the Maiorana brothers or to pay the debts of the Maiorana brothers to certain parties. Virtually none of this money went to NABCOR.

Mr. Maiorana contends that before this December 19th loan he, himself, and his brother had made loans to NABCOR and advances for NABCOR, but he produced no records of this and his testimony was vague, and all he could give was an estimate of 20 or 30 thousand dollars being loaned or advanced during the October to December period.

On the basis of the present record I cannot find that testimony reliable. He admitted that as far as the books were concerned the only amount shown for such loans or advances was $5,716.

The other part of the socalled one hundred thousand dollar infusion apparently consisted of two loans obtained from the Provident Bank in the amount of $25,000 each. All but $1,000 of that total of $50,000 was paid directly to the two land subsidiaries of NABCOR, Pocono Futures and Leisure Life.

On the basis of the NABCOR records made available to a Price Waterhouse accountant retained by General Motors, the total of all loans made by the Maioranas to NABCOR or its subsidiaries between October 1, 1972 and March 8, 1973 was $23,652. During this time the Maioranas received in loan repayments and salaries from NABCOR and the subsidiaries a total of $100,000.

The accountant whom NABCOR put on the stand confirmed that during this general period of time the Maioranas received in salaries and other payments total cash from NABCOR and the subsidiaries in the amount of approximately $90,000.

All in all, I find that plaintiff NABCOR has failed to sustain its burden of proof of showing that it is entitled to injunctive relief on its motion for a preliminary injunction.

The motion is denied.

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rdesb

APPEARANCES (Continued):

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WILLIAM A. KROHLEY, ESQ., OF Counsel.

WILLIAM H. MORRIS, ESQ.
Attorney for Defendants Westchester Rockland
Newspapers and Niagara Falls Gazette

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THE COURT: Let's take up the class action motion first, class action motion.

Could I ask you a few questions, Mr. Person?

MR. PERSON: Yes, your Honor.

THE COURT: The issue has been raised by the defendants as to the financial ability of Nabcor to carry on the action, and they mention a 1971 public offering by Nabcor in the Offering Circular stating that $50,000 of the proceeds would be used for the litigation, but the Offering Circular said that litigation was likely to cost a great deal more and the litigation might have to be abandoned.

Now that was back in 1971. How is the litigation being financed?

MR. PERSON: Well, the litigation for the most part, your Honor, is a question of my own time, so that to that extent, I am financing the litigation with my own time.

THE COURT: What about the extent of the Offering Circular? It said it was going to cost $50,000.

MR. PERSON: That was a sum put in there to try to be reasonable in the estimated costs for the offering. But there is not a guarantee that we would spend that or less or more. It is just a reasonable estimate of what the litigation in the longrun would cost.

A lot of the litigation is travel expenses, going back and forth from Pennsylvania, and things like that. So that the company has not had any difficulty in meeting its side of the expenses and I have not had any difficulty in meeting my side of the case.

So we don't anticipate any withdrawal at all. We anticipate continuing with the action. So that I don't see where there is a problem here.

THE COURT: Well, I am just puzzled. If it had not been for the statement in the Offering Circular, I would not be so puzzled.

Are you telling me or are you on this case --

MR. PERSON: Solely contingent, your Honor.

THE COURT: Solely contingent, all right.

Nabcor is not having to advance you a retainer as far as a fee?

MR. PERSON: Not one penny, your Honor.

THE COURT: As far as disbursements, that $50,000 would be used for disbursements and you are saying it has not run out?

MR. PERSON: We did not put the $50,000 in a trust fund, your Honor. It became part of the general working funds, and the company from time to time reimbursed me for my expenses in the case but not my time, which is the real expense. I have incurred all that myself, and my overhead, I have incurred myself.

THE COURT: All right.

Now, the defendants' papers said that some of the entities constituting the named plaintiffs are out of business. Now, let me just go through this, Mr. Person.

National Auto Brokers Corporation, I take it, is still in business.

MR. PERSON: Yes, your Honor, very much so.

THE COURT: We had the preliminary injunction hearing last spring, and is it still in the same business as it was presented back at that time?

MR. PERSON: No, your Honor. They have changed into what is essentially a real estate operation, and their brokerage operation, I gather, is at a minimal level. It is not being actively engaged in; that is, aggressively.

It may be that it is on a caretaker basis at best. In other words, the failure to obtain a preliminary injunction halting the activities complained about was in fact the reason why we were forced into abandoning that. Just to show that we were in good faith in trying to get that.

THE COURT: I'm sure the defendants would dispute that statement, but anyway, we don't have to cross that bridge.

You are saying to me that for whatever reason, the Nabcor operation now is a real estate operation; that the auto brokerage business has stopped, and your contention is it stopped because of the activities of the defendants; is that right?

MR. PERSON: Yes, absolutely, your Honor.

THE COURT: All right.

MR. PERSON: And that our claim for the past is nevertheless a valid claim even though in the future we have damages for the total destruction of the business. But we are not a continuing broker at this moment. I don't think you can say that we are in fact an automobile dealer or broker as a regular going business at this point. I can't

THE COURT: You find that initially through General Motors and then after you have found that out, at that point you can define the class sufficiently to send a notice?

MR. PERSON: If we find illegality, then those who had bought pursuant to that higher transportation differential would have a right to recover treble damages.

THE COURT: I am worried about at what point and in what manner can I have a class definition so I can get a notice out to comply with the rules?

MR. PERSON: As soon as we find the nature of the discrimination, if any. If we concede the method by which the discrimination occurred, those who fall within that formula would be the ones who are protected.

THE COURT: So you are going to go after liability in order to define the class?

MR. PERSON: That's correct.

THE COURT: Is there any authority for doing that?

MR. PERSON: Yes, there is definitely authority for having a class based solely on liability, yes.

I have argued that previously in the 15 percent matters. That is not inconsistent. It limits --

THE COURT: What do you mean 15 percent?

MR. PERSON: In the newspaper count.

That is what I am talking to you about. Nothing which has been brought out this morning has convinced me otherwise, but that I will strike the class allegations and deny class action insofar as anybody beyond the 250 Nabcor people. Do you understand?

MR. KLEINBARD: Right, your Honor.

THE COURT: So I will not allow the suit to go forward on behalf of G.M. or Ford franchise dealers or the fleet purchasers, anybody.

The only thing I have in my mind as a remaining question is whether the class action cannot go forward on behalf of the 250 alleged Nabcor brokers. Do you understand?

MR. KLEINBARD: I understand that, your Honor.

THE COURT: And it seems to me that on damage claims, I would think that the individual issues are substantial enough to preclude class action treatment.

We went through the Colonial Cadillac transaction and that was enough to illustrate to me very vividly that on the question of recovering damages -- I mean that was an injunction motion, but it illustrated the problems of causation, and so forth.

MR.KLEINBARD: Right, your Honor.

THE COURT: Now, what does occur to me is this: That on the question of the ability to get final injunctive relief, I'm not prepared on the present record -- I question whether on the present record it would be appropriate to exclude the possibility of class action treatment for the 250 on a claim for injunctive relief.

If there is a conspiracy by the four auto manufacturers or other antitrust violation by individual manufacturers designed to drive Nabcor out of business and its brokers, then if there was that kind of violation, I don't know why there could not be class action treatment to get an injunction.

MR. KLEINBARD: There are several answers to that, your Honor.

The plaintiff presupposes also that all he has to how is conspiracy and then he goes to damages.

THE COURT: No, wait a minute. Injunction.

MR. KLEINBARD: I'm sorry, to injunction. But he does not eliminate, either on damages or on the injunction for that matter, the question of showing the injury to the property of the particular plaintiff, and that is going to result in, as you have already observed in the determination in the other case, of several hundred trials, in effect, to determine, just as in the Colonial Cadillac case, whether this conspiracy, assuming it existed at all, had any particular impact on each one of these private parties.

You won't know until you have had trials on the merits in each case, whether or not that conspiracy had any impact or threatened loss of damage,which is the language applicable under the injunction action, to each particular claimant.

What you said in the newspaper causes of action, which seems to me is equally applicable here, is that you can only determine that on a full record with respect to each claimant.

THE COURT: That was a little different there.

MR. KLEINBARD: You had a larger number.

THE COURT: You had a more disparate class. I don't know whether the Nabcor group was or was not anything you could call an organization. They are claiming to be a franchise organization. Whether in fact they were, I don't know, but they claim to be. That distinguishes it from claims on behalf of any and all advertisers.

What I am concerned about here is an allegation of the conspiracy or othere antitrust violation directed at a franchise organization, and what I was wondering is this: That wouldn't we have a little more light shed on the question if we sent out a notice saying that the action has been brought, that the Court has been asked to treat the action as a class action, that a decision on this is pending, and ask if they want to be represented.

That might not be exactly in terms of the rule but the rule is somewhat flexible.

What I'm thinking of is this: If your prediction is true or your indications are true, then you are going to get back a flood of negative responses or letters returned unopened or that kind of thing. Because I think your contention is that these people are very thoroughly disaffected from Nabcor.

If that is true, then we may be left with an actio n where about eight people want to get represented or fifteen. Then that we can deal with at that point when we know what this class consists of.

MR. KLEINBARD: It seems to me, your Honor, at this stage of the game, you are putting the cart before the horse.

For example, what information exists on the question of, for example, the conspiracy to put them out of business. Frank Maiorana testified that Ford and G.M., who are the only manufacturers charged in the boycott counts with conspiracy, had no common plan to sell cars to Nabcor.

On the financial question which you asked earlier, even if it were confined to this smaller class, it was developed on depositions that of the $50,000, $37,000 had already been spent sometime back.

As of March 8, 1973, Nabcor had, if you will recall, a negative cash flow. It is no longer even in the same business. I don't think the Court ought to be in the business of sending out notices without any demonstration that these people are appropriate class representatives, number one, or that there are any hard facts to substantiate the allegations of their complaint.

THE COURT: On a class action motion, you don't get to the merits of the complaint.

MR. KLEINBARD: I realize you don't have to decide the merits.

THE COURT: You determine the kind of issues that are presented but you don't determine those issues on the merits.

MR. KLEINBARD: Well, each one of these dealers, your Honor --

THE COURT: What brings me to this, back last spring or early this year when we were talking about a contemplated class action motion, you or Mr. Kaplan made a very strenuous pitch to the effect that you felt there was such antagonism within this class, such disaffection, lawsuits back and forth, that kind of thing, that there really was no class; that Nabcor could not represent people who were in such antagonistic positions.

Now, that was one of the things which led me to get discovery started. I was concerned that you could take the depositions of all 250.

Now, how many of these brokers have you deposed?

MR. KLEINBARD: My recollection is that we have deposed all of the named plaintiffs and two others.

THE COURT: You see, I really hoped to get more information on the question which you brought up initially; that is, do these people want Nabcor representing them or do they not?

Now, as far as I can tell, what we have got beyond the named plaintiffs are two others.

MR. KLEINBARD: Excuse me, your Honor, plus the court records of any larger number that are in litigation with this particular plaintiff.

MR. PERSON: Different issues, your Honor.

THE COURT: They may be different issues and they may not be conclusive.

MR. KLEINBARD: Well, they all involve the issue of a breach of contract and fraud.

Of course, the plaintiff here takes the view that fraud is a relevent issue of integrity. I take the issue fraud involves the question of causation as well and that you are reduced -- I don't see any way out of it -- to, in effect, 200, whatever number there is, determinations of whether or not there has been any impact on the part of this alleged conspiracy or any other antitrust violation on these plaintiffs justifying their inclusion in a class and justifying their representation by these particular representatives.

THE COURT: What is the harm done? I mean the action has been pending for a couple of years or more. What is the harm from having a notice sent out asking whether these people want to be represented in this lawsuit by Nabcor or not?

MR. KLEINBARD: Well, I think the answer is the one that I have raised at the beginning, your Honor, that even if they want to be represented by these particular plaintiffs, which would be some kind of a death wish in my view, it is not an appropriate action for class action treatment.

That is the point. It would have been possible, your Honor, to have framed a complaint which would have been susceptible to class action treatment, but they did not do that.

THE COURT: Mr. Person, better start taking notes.

MR. KLEINBARD: I am not going to say how, but I think everybody would agree that it would be possible to do that.

But your Honor had the example right in front of you in connection with the preliminary injunction, using just the one that you are most familiar with, the Colonial Cadillac situation, what in the world would any of these antitrust violations have to do with that particular one?

THE COURT: Do I presume at this point that everybody else is in the same position as Nabcor East, was that it? Who was trying to deal with Nabcor?

MR. PERSON: Nabcor, Frank Maiorana himself. Three times over many years.

THE COURT: I feel reluctant to just presume at this point that all of these people are in the same position as the Nabcor fellow who was trying to deal with Colonial.

Obviously I found, and I am convinced, the reason they did not get the Cadillac is they did not pick it up. It is just as simple as that.

But is everybody else in the same boat? Can I presume that at this stage in the litigation?

MR. KLEINBARD: Let us assume, your Honor, that you find -- I think we could agree that less than 100 percent will respond affirmatively. That is a fair assumption because we have a number of lawsuits pending, and just in the nature of life everybody will not respond.

According to the damages which are alleged with respect to each Nabcor plaintiff, or each of the members of its class, the amount of money involved here would certainly justify, if they were interested, individual suits and not class action treatment.

I think underlying your whole position or the position we are arguing about is the assumption that even if they said yes, this would be an appropriate vehicle --

THE COURT: It is not, please. Just in class action motions there are always or there are usually several factors to be weighed:

There is the adequacy of the representation, the typicality or untypicality of the claims, the practicality of identification and the existence of common and individual issues, and so on, and so on.

In some cases you have ten problems in determining whether you are going to have class action treatment. I am not assuming one way or the other that they comply with the rule in all other respects.

I feel this way, that I am going to the point which you emphasize in your argument and you emphasized at the very beginning of our discussions early this year, or whenever it was, and I felt it was a very important point, and that is the question of the conflicts among the members of this class and whether there is such disaffection they don't want Nabcor to represent them.

I feel that on the present record, I don't know enough about that, it has not been sufficiently developed. It seems to me, without saying their reason on the problems with class action treatment, that is an important point.

I would like to develop it. It seems to me a very simple way to develop it, and that is to simply find out what the facts are. I think we can certainly figure out the mechanics under Rule 23 to find out.

It isn't like circulating notices to all the G.M. franchise dealers and raising a lot of problems. This is a group of people, the indications are, who are in a completely different category than franchised G.M. dealers.

And what is the harm in letting them know? Has Mr. Maiorana circularized all 250?

MR. PERSON: No. He has possibly talked to some people incidently in the context of running his business but I have told him not to solicit any of the people involved in the class action.

MR. KLEINBARD: Your Honor, I will concede the following:

I will concede that the identification of these 200 people, as a simple naked question of identification, is not difficult.

I will concede that if you tell them nothing about the nature of the plaintiff or the adequacy of the representation, that you might get some information which I think would be misleading.

THE COURT: If they are Naboor franchisees, I assume they know something about Nabcor.

MR.KLEINBARD: I don't think that people who have gone out of business two and three and four years ago have any conception with what is going on in Nabcor since then. They have since moved on to other fields.

What we are doing here, under judicial auspices, is in effect soliciting business for the plaintiff.

THE COURT: We passed that bridge a long time ago. A class action notice inevitably gives people an opportunity to join an action that they never dreamed about. That is a policy decision that was taken about the time I was born, I guess.

MR. KLEINBARD: Just a simple notice addressed to these people, do you want to join in this action against Ford and G.M. and whoever, is an inadequate notice.

That is something we can debate about in the future, because I think they ought to know who it is that is going to be the class representative in this case, and I respectfully suggest, and I think we have more than demonstrated it, that these particular plaintiffs, named plaintiffs, are inadequate representatives.

THE COURT: Mr. Person, I want to ask you, would you be willing to have a notice -- I'm not saying I'm going to do this. I think there are many problems with the class action treatment, even on behalf of 250, but I just would like, before making a final decision, to consider, if I can get all the information that would be relevant, and I don't feel I have it now. Would you be willing to have a notice include a questionnaire and have it ask whether they are still in business or when they were in business and get some information from them? Would you be willing to have the notice include a questionnaire -- well, a notice describing in neutral terms the nature of the claim and the nature of the denials by the defendants and then after notifying, have a questionnaire asking these and maybe other questions, as to what kind of an entity it is, whether a corporation or partnership; is it still in existence; when did they do business as a Nabcor broker; if they are still doing business and if not, when did they stop; and do they wish to be a member of a class represented in this action?

MR. PERSON: I would like to send a copy of the complaint to them so they can see the allegations in the complaint.

THE COURT: Wait a minute.

MR. PERSON: It may be advantageous to them to have their own attorney see this and maybe be able to give them some advice.

THE COURT: We can givem them an opportunity to get it if they want. But that is a big document. I want a simple notice. I want a summary. I do not contemplate sending this complaint out now, I do not.

And I am asking you if you would be agreeable to have a summary go out in the first instance with the kind of questionnaire I am suggesting? Would you be willing to do that?

MR. PERSON: Yes, your Honor, I would. You will find the franchisees are not as hostile as you may think. It is of some interest to me.

MR. KLEINBARD: May that notice also include your Honor's findings with respect to the principals of Nabcor and some of the other details that have been developed about Nabcor?

MR. PERSON: Findings were not part of the decision. They were, I think, outside --

MR. KLEINBARD: I think we ought to have the opportunity to notify these plaintiffs as to who --

THE COURT: In plenty of cases, the Court has given conditional class action treatment and sent out a notice, and the notice never includes that kind of thing. It tries to be a bland neutral statement of the case, and that is what I would have in mind here.

I am going beyond one of those notices and requesting some specific information, but I feel if the plaintiff will agree to that, I can do that.

MR. PERSON: I will point out that that does limit the response. Normally in the class action field if one does not opt out, he is in. We are reversing it with the prospects for a minimal return but I am willing to go along with it, your Honor, because you will find, I think quite surprisingly, that the people have been hurt and they do want some kind of justice.

THE COURT: Let's take a short recess.

(Recess)

MR. KLEINBARD: Your Honor, I think I can finish on this aspect in a moment, if you would permit me.

Just passing the question of notice for a minute, I just want to repeat again. I think I said it but

I want to make it perfectly clear that it is my position that the entire action here, irrespective of this notice, does not lend itself to class action treatment. And the basic reason for it, although we have elaborated many in our brief, is that you are going to have to try, with respect to each one of these 200 or however number of brokers there are, what happened with respect to the order for each car, because the circumstances under which they were or were not permitted to get a car or did not get cars are going to be different in all circumstances.

There is no basis here for assuming a uniform reason for their inability to receive cars. And to me that eliminates the entire basis for this being a class action.

MR. PERSON: Your Honor, may I respond?

THE COURT: No.

Go ahead, Mr. Kleinbard.

MR. KLEINBARD: Every trial will be peculiar to the particular broker for the reasons I have enumerated.

THE COURT: I think the chances are you are right. I think that problably the Colonial Cadillac matter was reasonably typical, but I don't know whether I can assume that at the moment.

MR. PERSON: Your Honor, may I point out something?

THE COURT: Let him finish and then I will hear you.

MR. KLEINBARD: Of course that assumption is true whether there is a conspiracy. Those facts remain true whether there was a conspiracy or was not.

So far as this notice is concerned, if I understand your Honor correctly, after you get it, it is not going to answer the question of adequacy -- it is not going to be addressed to the question of adequacy of representation, your Honor will hold this motion with respect to this particular class, deny it as to the rest, and then determine on the basis of the response, the briefs and everything else, as to whether or not these plaintiffs are adequate representatives on whatever you get.

THE COURT: Yes, absolutely. What I would like to do, and I know that this is not expressly provided for in the rule, but because of the peculiar circumstances in this case and the type of arguments raised and restricted it strictly to this case, with no precedent value at all, I hasten to say, it seems to me that what I would like to do is to defer all the questions relating to the representation of the 250 Nabcor alleged group, and that would include a determination of the adequacy of the representation. And the fact that a group of people want Nabcor to represent them would be of some significance to me.

MR. KLEINBARD: It would be a factor but not a determining factor.

THE COURT: Of course not. Not conclusive. I thought I made this clear.

There are many factors of significance on the question of the class action treatment for the 250 and I would like to get more information on one of them and defer decision.

Now, Mr. Person has said he is agreeable to that and I know you have expressed dismay about it, but would you be agreeable to it?

MR. KLEINBARD: The reason I have expressed dismay is in part the fact that --

THE COURT: You feel that there are plenty of other reasons to deny class action treatment.

MR. KLEINBARD: Yes, your Honor.

THE COURT: I have expressed my view. In view of what we have said, would you be agreeable to the procedure that I have suggested?

MR. KLEINBARD: Your Honor, I can't agree with it. I recognize your authority to do as you will with it. What is going through my mind is supposing our papers had been submitted and we had said nothing about the fraud actions between some of the brokers and the Nabcor plaintiffs. It is an unusual case where you find the named plaintiffs being sued by some of the brokers they purport to represent.

I just wonder whether we would be here, having this entire discussion. I think the motion would have been disposed of.

THE COURT: That is a hypothetical question. I can't really answer you.

MR. KLEINBARD: That is what is going through my mind. I feel that this one little aspect of our attack on the class action has been magnified out of all proportion. That is the difficulty I have in agreeing with your Honor.

I want to make two observations about the notice, if your Honor decides to go forward with it.

I take it, it will be made clear to these brokers that Nabcor would not be bringing a class action on their behalf with respect to Robinson-Patman claims because here they are clearly not qualified to be members of a Robinson-Patman class, being brokers and not purchasers or customers.

THE COURT: Mr. Kleinbard, if we are going into that, as far as I was concerned, you could have taken the depositions of all of these people who could have been identified.

I really contemplated many, many more depositions than you took. I contemplated many more depositions, or some kind of discovery, and I said that on the record. We have come up with very little information about this class and I thought we would have a lot.

MR. KLEINBARD: Your Honor, may I say there are two parties to the collection of this information. Mr. Person, who is the representative supposedly of this class, has had three years and since the making of his motion to do that.

We conducted depositions day-to-day within the time period that was permitted and that is all that happened.

MR. PERSON: We asserted they were members of the class and to go forward in the area of fraud is certainly not my obligation.

MR. KLEINBARD: I am certainly not talking about that. I think I have made my position clear on this aspect.

THE COURT: Is there any provision for discovery on written interrogatories of people other than parties?

MR. PERSON: Not a nonparty.

THE COURT: Can you address yourself to that?

MR. KLEINBARD: I am informed the Second Circuit has permitted it after the determination of the class, but not for class determination.

MR. PERSON: But as a provisional possibly we might be able to do it.

THE COURT: But suppose you have an outside witness, is there any provision for submitting written interrogatories to a witness not a party?

MR. KLEINBARD: No, your Honor.

MR. PERSON: There is, your Honor, in a sense that they could answer written interrogatories orally. I believe that may be the way it might be done.

THE COURT: All right. What I'm thinking of finally is this:

I think that the adequacy of the representation is presented as to the 250 in a little bit different aspect than, let's say the Ambook case and certainly with respect to the 42,000.

Nabcor and these francisees purport to represent people in what they call a franchise organization.

Now, the ability of Nabcor and the franchisees to represent people who want to be represented in their own purported organization, that seems to me to present a very much different question and the ability of Nabcor to represent completely different people, newspaper advertisers, G.M. franchisees, and so forth.

That is why I feel that I think we have to focus on it differently. I think --

MR. KLEINBARD: It is different, your Honor, but, of course, in our view, the inadequacy still remains.

If your Honor, however, wishes to get purely this narrow information which you have outlined, it seems to me that it would be preferable to submit an interrogatory to these people than a notice emanating from the Court, because this is going to be for use by the Court in the nature of additional discovery.

That is really what you are talking about, as I understand it. You are saying there are certain facts that did not come to your attention.

THE COURT: It really is, you are right.

MR. KLEINBARD: I would much prefer to see that as an interrogatory which Mr. Person and our office would try to frame, and if we have any difficulty, we would come back to see you.

THE COURT: It is discovery. I am looking at Rule 31. I really didn't think this through before coming up here, and I wonder if we could use Rule 31, "Depositions

Upon Written Questions."

Mr. Person, could we do this --

MR. PERSON: Could we invite them orallly to the court by notice?

THE COURT: No. I think the kind of information I have in mind should be, it seems to me, furnished in writing.

I wonder if we could not agree to have written questions -- a set of questions approved by the Court submitted to all 250 and do it under Rule 31, except that the questions will be agreed upon. They will be submitted in writing and these people will be asked to subm it their answers in writing in the first instance.

Now, if any party wants then to take a deposition and cross-examination, they are free to do it, you or Mr. Kleinbard.

But you may have a situation where the written answers are so cut and dry and simple that you don't need to go to him or him come to you.

MR. PERSON: One of the difficulties if we are trying to seek evidence relating to the claims in this suit, is that the franchisees really do not understand the theory of our suit because they don't know of it.

So they might not be able to respond, if we are

are looking for evidence now, of G.M. liability or something like that. We have to be careful to limit it to whether they want to be represented in a suit which alleges certain things as a claim and as defenses.

I think we could do that. But to ask them, do you know of any way in which G.M. has injured you --

THE COURT: I am not asking that. It is a matter of form, and I am suggesting the same kind of questions but there is a problem in sending out what I was thinking of and calling it a notice under Rule 23.

Frankly, if I did that, there would be a precedent. I mean the next case, some lawyer would get a hold of a bench decision in this case and get a hold of it and they would be using it as a precedent and I don't want that, because I don't think it is probably authorized.

I will tell you what, I am going to do one or two things: I am going to deny class action treatment or else I am going to defer it pending some simple written discovery to the proposed class members.

The written discovery is different only in form from what I was talking about before. In this case, I don't think it makes a lot of difference, the difference in form. But as a District Judge here, I have to be concerned about differences in form. You appreciate that, don't you?

MR. PERSON: Yes, your Honor.

THE COURT: I think what we ought to do is to call it discovery, and if we submitted written questions to these people with leave to any party to take depositions after the written questions were answered, I don't think that does violence to any rule.

MR. PERSON: Could we agree upon the effect of the answers? Would they be given the same effect as answers to interrogatories by parties, or would there be some other type of effect?

MR. KLEINBARD: Information is information.

THE COURT: They will be given the effect that they deserve to be given. I won't cross that bridge now. I think they will be treated as deposition answers by Mr. X. and Mr. Y., and they are subject, of course, to cross-examination on all questions.

MR. PERSON: But the answers would be written at the outset?

THE COURT: Would be written, because I don't think it is fair to these people and I don't think it is fair to either lawyer here to have oral depositions of 150 or 250 at this stage on the kind of simple information we want to get.

MR. PERSON: Can we have a direction from the

Court that there be no contact with these people other than with the notice to the other counsel?

THE COURT: Absolutely, sure.

MR. PERSON: Because that, I think, is important.

MR. KLEINBARD: That obviously applies to both sides, your Honor.

THE COURT: Yes.

MR. PERSON: One further problem then --

THE COURT: Are you agreeable to that, having a set of questions submitted to the proposed 250 or any part thereof that can be identified by Mr. Person and have these questions submitted under Rule 31 with the change in procedure that the answers are to be in writing initially, subject to oral depositions to be taken by anybody who wants to take it?

MR. KLEINBARD: Your Honor, I find it preferable to the first suggestion.

THE COURT: Then we are getting closer.

MR.KLEINBARD: But I would prefer to just except to your Honor's ruling on that question since I regard it, and I have now said it ten times, that the whole thing is not susceptible to class action treatment for the reasons I have set forth in the 115 page brief, which I hope your Honor will get a chance to absorb between now and the disposition of this motion.

As I understand it, the only thing that is left of this class action motion is whether or not there should be a Nabcor class, Nabcor and its brokers.

THE COURT: Absolutely.

MR. PERSON: That is for liability and injunction.

MR. KLEINBARD: On Counts 1 to 17, and whether or not there should be an injunction.

MR. PERSON: Your Honor, Nabcor has been -- that is, the Nabcor franchisees are requested to be class members throughout a lot of the complaint, so that anywhere where they appear --

THE COURT: Any claim where they appear.

MR. PERSON: And the class, if allowed, could be allowed for as much as liability only and the injunction. In other words, we are not asking for damages --

THE COURT: Wait a minute. Mr. Person, what I am proposing is that I will defer decision on whether or not the 250, or thereabouts in number, Nabcor franchisees can bring their claims in this action as class claims.

I am proposing to defer decision on all aspects of this subject to further information. The further information I propose to obtain through discovery, basically under Rule 31, and that discovery will consist of questions of the kind I mentioned earlier, which would be proposed by the parties here and approved by the Court and sent in writing to any of this 250 that you can identify.

The answers would be initially received in writing. There would be a questionnaire. The answers would initially be received in writing, notarized, I would assume, under oath, and upon receipt of those answers, any party is free to take the depositions of these people on oral examination, subpoena them or do whatever is necessary.

Now, is that agreeable to you?

MR. PERSON: Yes, your Honor.

THE COURT: Now, any of the other defendants -- I have talked to Mr. Kleinbard. Do any of the other defendants in the Nabcor action have a position on that proposal that they want to state?

MR. KROHLEY: I represent Chrysler Corporation. We take the same position as General Motors on this. We except to your Honor's ruling but we prefer it to the other alternative.

THE COURT: Anybody else want to be heard?

Let me just put a statement on the record while we are here.

This is a statement of my decision today on the

On April 10, 1973, after two evidentiary hearings, I denied Nabcor's motion for preliminary injunction. I noted at that time that Nabcor was maintaining itself by land speculation in the Poconos and that the overall financial condition of Nabcor was bleak, Nabcor having a negative cash balance as of March 8, 1973.

I held that Nabcor would not be a fit representative for the class of 10,000 advertisers, and I held the same with regard to Nabcor East, one of Nabcor's brokers.

I note at this point that in 1971, Nabcor sold an issue of stock for $300,000, and in an offering circular for that issue stated that $50,000 of the proceeds of the issue would be devoted, if necessary, to this litigation.

The Offering Circular stated that the litigation was likely to cost a great deal more, and the litigation might have to be abandoned if the financial circumstances of Nabcor did not permit its continuance.

In view of the representation in the Offering Circular and in view of the facts as indicated on the record in the preliminary injunction motion in this case last spring, about negative cash balance and so forth, a serious question, to say the least, arises as to the ability and intention of Nabcor to carry on the present litigation.

The implications of these facts are in contradiction to what has been told me today by the attorney for Nabcor.

The attorney for Nabcor says that there is no financial problem in carrying on the litigation. Nabcor is advancing only disbursements and the legal expenses are being made to depend on the contingency of success in the action.

On balance, I believe that Nabcor is not a proper party to be entrusted with representation of potential antitrust claims by 42,000 auto dealers and fleet purchasers, and for this reason, for this additional reason, class action treatment of the claims of the 42,000 so-called retail class members is denied.

We come to what I regard as a different question when we are dealing with the class of 250 alleged Nabcor brokers.

As I have indicated on the record of this hearing, I am deferring decision as to this aspect of the class action motion. A number of arguments have been made against class action treatment.

It is argued that Nabcor is just as incapable of representing the 250 as it is of the 42,000. I am not deciding that question at the present time. It seems to me that the adequacy of the representation may stand on a somewhat different basis when we are dealing with only 250 versus the 42,000.

In any event, I am deferring decision on this aspect of the class action motion pending the taking of additional discovery as outlined in our discussion at the hearing today.

Let me return to one point which I neglected to cover with respect to the class of 42,000.

Certain individuals and corporations and partnerships are named as plaintiffs in addition to Nabcor. I do not find that they add any appreciable weight to the ability of Nabcor to represent the class of 42,000.

As the record today showed, two of these individuals are principals of Nabcor itself. The other named plaintiffs are either Nabcor brokers or individuals who are principals of Nabcor brokers in all or almost all instances.

These brokers did a minimal amount of business or no business and are no longer in business. In my view, they are individually and collectively inadequate to represent the class of 42,000 auto dealers and fleet purchasers.

on any longer than I have to, ut I can't certainly decide them right now.

Now, I would be happy to have another adjourned session of argument, and I will try to be better prepared on the materials in the briefs which, frankly, my clerk has gone through the summary judgment motions but I have not.

So I would hate to have everybody come back and forth and I am perfectly happy to do it.

MR. KLEINBARD: Unfortunately and due to nobody's fault, this has taken a fair amount of time. I think the notice will be substantially affected by the determination on summary judgment.

So I would -- or the interrogatories, if you will -- so that I would prefer that we have, if necessary, an adjourned session so your Honor does have the opportunity to have any questions you want answered.

Because if the Nabcor class and the brokers, as we feel, do not even belong in the Robinson-Patman situation at all, that could be disposed of and the interrogatories that are posed are therefore much simpler.

THE COURT: In the interrogatories what I contemplate is a very simple question, a question which will state very simply the nature of the action. It is not going to state Robinson-Patman Act theories. Just a very simple statement of the action, that it is an antitrust action brought on behalf of Nabcor or attempted to be brought on behalf of Nabcor and its franchisees alleging antitrust violations by the auto manufacturers and others, designed and having the effect of deferring the business of the franchisees.

I have in mind a very boiled down summary, which is really, I think -- and if anybody wants to get a copy of the complaint, they can do it -- but I do think that considering the kidn of entities which have been indicated here, we are not sending these things to American Air Lines or to big sophisticated entities.

We are probably sending them to laymen who will not read these things and not go to their lawyers. I don't think it is going to help them to have an elaborate legal statement. I really don't.

I think what we want to present is something very simple and ask -- and they know enough, I assume, about their relationshps with Nabcor, as to whether or not they want to bother with it again or not.

So I would hope that we could get these interrogatories out fairly quickly and not have them very involved.

MR. KLEINBARD: I am not disagreeing with that except I do think -- I disagree with you to this extent:

You asked earlier what difference it would make. I think it makes a big difference as to the size of this case and that these motions are therefore important.

So independent of the interrogatories, I would like to have this summary judgment conducted just as rapidly as possible.

Secondly, we are prepared today and we are prepared to come back whenever your Honor is ready to hear that. I wasn't thinking in terms of three weeks from now we would have this matter argued and disposed of.

I think that the issues of boycott and Robinson-Patman are vastly different and in framing your simple description to the Nabcor brokers -- and I don't disagree that it should be simple -- it makes quite a difference whether you want to talk about a boycott to drive them out of business or to refuse delivery of cars, and you have to make reference to others of these discriminations.

For that reason, if it were possible to get determination on the Robinson-Patman situation, it would be very valuable. It is important, in any event, to this case for it to be slung down to its proper size. Whenever your

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secretary. I think the statute of limitations is dispositive on the Better Business Bureau, and the lack of a showing as to this second alleged advertising on the newspaper motion. I would grant both those motions, but I don't need to detain you on that.

On the class action motion, I did go over Mr. Kleinbard's letter. I think there are obvious problems with using Rule 31, but, believe me, one of them is not that it is going to cost -- what is it? -- some astronomical amount of money. That really was not the point. I did not contemplate having a subpoena served on these people and witness fees and all. I considered that they would receive a written questionnaire and respond to that or nothing.

I have gotten a letter now from Sullivan & Cromwell suggesting that it is better to do it under Rule 23(d). The problem I have got on that class action motion is that I feel that the record shows me quite a bit about the named plaintiffs, but it does not, frankly, Mr. Kleinbard, show me much about the others. After giving this a lot of thought, again I think that a situation where it is alleged that there is a conspiracy directed to the members of an organization -- that is the allegation -- is something different from the situation I dealt with in Ambook, the situation of Judge Ryan's decision that you cited to me, and most of these other

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decisions where you have got allegations of antitrust activity against completely dispersed,independent, disparate people located all over the country.

Maybe I am overemphasizing the problem, but I can't get it out of my mind. In your papers you bring out a lot of points, but I don't think it completely avoids this problem that this is a claim of a conspiracy directed to the members of the organization.

That is why I feel that it would be good to get some more information than we can now have about these other people. I think we have got a lot of information about the named plaintiffs. For instance, in your brief you talk about the fact that one of these named plaintiffs has admitted that he was never hurtby Ford or General Motors, and he has a lot of admissions. It seems to me that fellow can't possibly represent other people, that is, I feel I know a lot about that, and I feel that he has admitted himself to the point where he could not possibly represent people who may have, in theory at least, valid claims against General Motors.

Maybe the best approach and the most economical approach is to more carefully analyze the named plaintiffs and if it is apparent that the named plaintiffs have made fatal admissions or have admitted themselves out of court,

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then it seems to me how can they represent the rest of the NABCOR organization who may be in theory wanting to assert claims. Maybe that is dispositive, I don't know. I will just get back to the point. I feel there is information about the named plaintiffs and there are indications, there are hints, about the others, but not much in the way of hard facts. That is what bothers me. I don't know whether they have or have not been hurt by an alleged conspiracy. I don't know whether they do or do not want to get represented in this action. That is my dilemma.

MR. KLEINBARD: Right. Your Honor, I think both in the brief and in the letter and at last time's oral argument we pointed out several reasons why there should not be class action here, independent of the desires of the class. I don't want to repeat that again, because it is in the brief. Primarily, questions of impact and causation and a predominance of individual issues over commonality.

Those will all remain, assuming any kind of notice or depositions, at whatever cost, and we don't have to debate how much it is going to cost here. Those issues are all going to remain after any kind of communication with the absent members of the NABCOR class is sentout and received. It was for that reason that we felt, after reflecting on last week's proceedings, that this in a large sense, although perhaps providing your Honor with some information, would be information which really would not contribute very much to the disposition of the motion.

The only thing that I have not put in the letter, that I feel rather strongly about, that I wanted to call your Honor's attention to today on this general subject of a communication with the unnamed NABCOR brokers, is that if you contemplate any kind of a simple-type notice, it seems to me grossly unfair, because if you look at the appendix that we have annexed to our brief we have annexed there the various respects in which NABCOR has deceived its brokers. It has failed to point out to them, for example, that their profit projections are really based on fantasy rather than on objective facts; that there is no truth to the fact that they were dealing with $50 over the invoice price or that they were welcomed by the automobile manufacturers or that they were being treated as a fleet. All of these were affirmative misrepresentations being made by NABCOR and, of course, are the subject of some suits.

If you are going to send out a notice without indicating this kind of information to the class and say, "Would you like to be represented by these people," it seems to me that it is a grossly unfair kind of notice. It is very much like asking a pauper if he wants to be adopted by some rich uncle without telling him the uncle is both immoral and impossible to live with.

If, on the other hand, we are going to have the kind of discovery which would permit the disclosure of all of these facts and eliciting real information from these people, then you are getting back into what I am talking about in terms of expense and burden and shifting it, of course, from the plaintiff where it belongs to us.

THE COURT: Oh, no, I didn't buy that at all. I think there are problems with the approach here. I don't deny that. What I was assuming, though, was that these people must know something about NABCOR.

Without our, the Court or the lawyers, telling them anything good or bad, just the present state of their information, to ask them some simple questions about whether they exist as a business and when they did and how much business they claim they did in this NABCOR operation, very bare facts, we at least find out what kind of an entity they are. Then we ask them -- and it could be couched specifically -- if they wish to be represented.

Your point is that that will just appear to be a wonderful invitation to become involved. But if they know and it can be made clear to them that if they join this they are going to have to be deposed, that it isn't just a gravy train that they are going to be riding, then maybe at least we will find out more than we now know.

MR. KLEINBARD: Any poll, your Honor, obviously results in information, and on that I can't disagree. What I am disagreeing with is the value of that information in light of the fact that there is substantial evidence in the record that NABCOR concealed its true activities from these people, so that you will find out that they exist, you will find out when they went in or out of business, you will find out how many cars they did or didn't handle. But I don't know that it contributes anything at all to the one subject that you are concerned about.

THE COURT: You wrote a very fine brief and you assumed that the arguments are irresistible without even that point.

MR. KLEINBARD: I was totally persuaded, your Honor.

THE COURT: A lot of those arguments go a long way but they don't go all the way. That long appendix at the end was very interesting, but I really could not use it. Legally can I use that as a basis for holding that there can't be a class action on behalf of these people?

There are, say, a dozen or whatever number of people who have sued. That is a small number out of the 200 or 250. There are two or three that have expressly

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stated they don't want NABCOR to represent them. That is a small amount. It is about the number that might opt out. What am I going to assume as to the others?

Mr. Maiorana has stated that all but a few are out of business. We have got a lot of indications. But my problem is going across the goal line and deciding this motion and being fairly sure of it.

MR. KLEINBARD: I have two answers, your Honor. Neither of them is original. Neither of them has been unheard or unstated before. We keep focusing, in the dialogue which you and I have, on the adequacy of the representation, whereas I think that the basic question on this motion has to do with the predominance of individual issues, and that even if NABCOR were of unimpeachable integrity and there never had been a lawsuit, I think this motion should be disposed of against class action. That is my basic problem.

THE COURT: I think that it could very well be that on the Robinson-Patman issues, that kind of thing, you are right. I think there you have got people dispersed geographically. I think your arguments are quite persuasive on the Robinson-Patman. But on the conspiracy I cannot get away from this fact: I have to assume, if this goes up to the Court of Appeals, they are going to look at it in this way: You have got a claim on whi merits have not been decided. We have got to assume there is a provable conspiracy for the purposes of th motion. If we do, you have got a situation where a relatively small number of people -- I mean small in comparison with 10,000 or 40,000 -- are a class with a conspiracy claim. A conspiracy claim may be very hard prove, may be much harder than, say, not giving back a refund under the Robinson-Patman, which may be relativel simple. Here a conspiracy claim is something which may hard. Do you want to do it once or do you want to do it fifty times? This is something that I think the Court of Appeals would look at this way on the present record.

The conspiracy claim is hard, all right. It constitutes the core of the particular first counts of the complaint. It ought to be done, if it is going to be done, once and not numerous times.

Weighing that against the individual issues, yes, you have got individual issues about the fact of injury and the damage, I grant you; but, you know, our Court of Appeals has said, "If there is enough of a core issue, a substantial issue, to make it worthwhile, then you can handle those individual issues flexibly, you can have separate trials, and the important thing is that you don't

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have 10,000 or 40,000 people.

Suppose you do have to try the issue of fact, the damage, or individual damage, as to 200. I am not at all persuaded, at least on the record here, that it is not worth it to take this case, try the conspiracy, and sweat it out on the individual issues as a matter of judicial administration.

It seems to me where you may overcome that is if you find out more information about this so-called class, who are really a bunch of unknowns to me right now. Then I might feel I might get a better guide than I have right now. But you were certain that you were right on the other arguments, I don't question your sincerity, but I have to say to you that I am not so certain on the present record. And I couldn't send this up on a 1292(b). I don't think it is worth it.

MR. KLEINBARD: Let me just say two things, your Honor. In the first place, from the point of view of the administration of justice, the trial that I contemplate, based on this complaint and everything that we have been able to find out on a 4,000-page deposition record, is certainly not the trial of a uniform conspiracy; and even if it were a uniform conspiracy, about which, as you know from our brief, we have grave doubts, stretching over all

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these geographic areas and involving all these co-conspirators, that is a presumption that is unlike the normal conspiracy case, but, in any event, because of a mass of people that he has involved in this alleged conspiracy.

Similarly, I don't know that the judicial administration is being favored when every newspaper ad, every car sale, every financing transaction, with 200 people, is tried in one case as opposed to the number of cases --

THE COURT: If the activities of the 59 dealers and the newspapers emanated from a source, either one source, a common conspiracy at GM and Ford or, say, two sources, one Ford and one GM, if the activities of these people down at the bottom are just the result of the fellows at the top -- it isn't quite the way you put in in your brief. I know it is a big "if."

MR. KLEINBARD: It is not only a big "if," your Honor, but it seems to me that it has been and should be the plaintiff's burden to have established that all this time. I am not talking about on the merits, but to have shown the identity of these people and all of the things that you now want to find out by way of so-called additional discovery. Where have they been for all these years? He has said on deposition that he knew of 162 NABCOR brokers. That is a big chunk out of the 200 or whatever that we are involved in. Where have they been with supplying the data that your Honor wants to satisfy your Honor that there is adequacy of representation? We are now being told that that burden, which I think is squarely his, is somehow our burden and that we are somehow or another at fault because the state of the record before your Honor is not all that your Honor would like on the adequacy of representation.

MR. PERSON: Your Honor, may I just add a little bit here which might help? We did bring a complaint and we alleged that we had sold franchises to a group of people called NABCOR franchisees. We alleged a conspiracy, and we have alleged that it was directed to the franchisees, causing them a loss in the value of their franchise. We have named the franchisees, and I think we presented enough to survive a motion here in that area, that we havepresented, I think, a sufficient amount of our claims.

THE COURT: Where do you name them?

MR. PERSON: We have named them. You have the names, isn't that true, that we have given you of the franchisees as one of the first things we gave to you three years ago?

THE COURT: How many have you named?

MR. PERSON: We have named probably close to 200.

MR. KLEINBARD: Yes, we have a list of 162 names.

MR. PERSON: All right, 162. We have more that have come in subsequently.

THE COURT: What do you mean by that?

MR. PERSON: We sold additional franchises after the commencement of the action.

THE COURT: What is the total now? What is the total?

MR. PERSON: I don't know the total, because I have to go back and talk to certain NABCOR masters and area brokers who themselves are not parties but had sold franchises. So I can't give the franchise name, but it is somewhere in the area of 250. I think that is an approximate number. We have supplied most of the names three years ago.

THE COURT: Have you supplied them to the Court?

MR. PERSON: Yes. Of course we have.

THE COURT: When? In what form?

MR. PERSON: We supplied that I think in an affidavit form in which we supplied as an exhibit to the affidavit all of the names of these franchisees that we had at the commencement of the suit.

THE COURT: How about the additional ones now? I have not received any updated information.

MR. PERSON: We have not given names of franchisees as the franchises were sold.

THE COURT: Have you got a current list of names and addresses of franchisees that constitute this class?

MR. PERSON: I don't have an up-to-date list. I can add the ones which we know about. But we still have to go back to our masters and areas who are not parties and ask them who did they sell franchises to. I haven't done that. We haven't made contact with these people; they are not parties.

THE COURT: Frankly, Mr. Person, the thing I am concerned about, and it has been frustrating to me, we have had a lot of litigation, we have spent a lot of time on nice points of Robinson-Patman Act law and class action motions and so forth. The thing that I am concerned about is that there just is no class, this is so vague. That is why I get frustrated in going off into every other question in this case and complex Robinson-Patman problems, and then if I deny the class action you will be up in the Court of Appeals arguing the common issues of law and fact, and I don't even know whether this group of people constitute a class.

MR. PERSON: They are all franchisees and they have rights emanating from the same corporation.

THE COURT: This is a bunch of theory you are giving me.

MR. PERSON: We have supplied the agreements. We have had all sorts of franchise agreements that have been supplied. We have had affidavits relating to it. I supplied a very long memorandum relating to the damage which occurs to the whole system.

THE COURT: This is a bunch of theory. It is not like a situation where a class action is brought on behalf of all the people who bought the securities of X company at the issue date. In that case you know that happened. But this is a situation where the more you probe into these plaintiffs, the more you find out they are either out of business or they never went into business or they bought and sold two cars or they didn't manage to take delivery of the cars that were offered them. This is not the normal case.

MR. PERSON: Of course not, your Honor. The reason they went out of business is that GM and Ford --

THE COURT: That is what you say.

MR. PERSON: That is my complaint, that is what we are going up on: the fact that they were put out of business by a conspiracy; the fact that they didn't do

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business is evidence of it.

THE COURT: Let me just shift to another point. Could you look at your class action brief, page 30.

MR. KLEINBARD: Yes, your Honor.

THE COURT: This to me is very telling. You quote, and if this is a fair quotation --

MR. KLEINBARD: Peter Cucci.

THE COURT: -- from the Peter Cucci deposition, Courtesy Auto Brokers. He testified that after he bought his NABCOR franchise he sent out mailers to about a hundred people and ran an ad in the Pennysaver on Long Island. Aside from this, he did not do anything to locate customers. He obtained one automobile order. He never tried to buy an automobile from a franchised dealer. He testified that he never took any action to injure him or to interfere with his business. Why did he go out of business? He said, "I don't know right now what the reason was at the time." He went on to testify that the decision was a wholly independent one on his part and that it had nothing to do with any action by General Motors or Ford or any franchised dealer.

Now my question to you, Mr. Kleinbard: Is that deposition typical of the broker plaintiffs? If it is, I think that --

MR. PERSON: May I add something?

THE COURT: Maybe it isn't.

MR. PERSON: He was arrested pursuant to a complaint by a dealer. He was arrested, thrown in jail, and we had to -- I believe he was putin/jail. But I think he was arrested by a detective, and we have had plenty of evidence on that, and NABCOR had to get him out of that difficulty. We had an opinion thereafter from the Department of Law, Suffolk County, that we were not acting illegally. But in that case that activity itself frightened the person off.

THE COURT: He has made admissions that it seems to me take him out of court.

MR. KLEINBARD: If anything, his deposition should have run the other way if what Mr. Person says is so.

But, your Honor, doesn't this testimony point out, it seems to me, the lack of typicality? In other words, you are going to get with respect to each one of these 200 people a particular story. I happen to think that the story you will get will be predominantly either this or other problems.

THE COURT: But you are asking me at every stage to assume a bunch of things about people who are not in court who I don't know anything about.

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MR. KLEINBARD: But, your Honor, I have done, it seems to me, what I could within the time limits that were imposed on us, because we went day to day to develop what we could. I think we made a very persuasive showing with respect to the named plaintiffs and I think one or two others.

Here sits a plaintiff who would haul all these people into court, who has had three years to get all of this information contra, to show that in fact they were all the victims of a single conspiracy, to show --

MR. PERSON: Class action. Could not.

MR. KLEINBARD: -- that there was only one thing that happened to all of them, to show that all of the events were common, that they were all typical. That is his burden. I am not supposed to be establishing his case for him. We are all here in court --

THE COURT: I don't know any law that you have got to --

MR. KLEINBARD: -- time after time just to satisfy a theory.

THE COURT: My question is: Is the deposition of Peter Cucci at all typical of the depositions that you have taken of the other brokers who are named as plaintiffs?

MR. KAPLAN: Your Honor, several of the depositions

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are much like this, although they obviously involve completely different fact situations. There are one or two who claim that they had problems and would like to attribute it to General Motors, and your Honor has had one such case before you on the Dale Strimple affidavits, and so forth, in connection with the Paul Batt Buick motion for summary judgment. Strimple told a story that General Motors interfered with the sale of a car by Paul Batt Buick. That was all before your Honor.

The point is that each one of these stories is completely different. They had nothing to do one with the other. One guy couldn't get a car from Paul Batt in Buffalo. Cucci had no problem.

If your Honor would simply also look at pages 138 and following of the Cucci deposition, which are in this volume handed up, the account about this arrest and everything else that Mr. Person just gave is absurd and has nothing whatsoever to do with Cucci's testimony.

I will just quote one question and answer. He got a telephone call from the DA asking if he was operating in violation of the licensing laws, and I asked, or whoever was examining, asked: "And that short investigation didn't cause you any problems at all, did it?

"Answer: Scared me.

"Question: Scared you?

"Answer: Yes.

"Question: But it didn't interfere with your business, did it?

"Answer: At the time it didn't seem like it did." That is on page 139.

MR. PERSON: I have not had the chance to go further with any of these witnesses, your Honor. The depositions have been continued. I still have not had a chance to pinpoint my side of it. So that all of this is only one side and it does not even serve to prove their point.

MR. KLEINBARD: I don't understand that statement, your Honor.

THE COURT: Couldn't you cross-examine?

MR. PERSON: No, because it has been continued. This is all in relation to our preliminary injunction motion.

THE COURT: Nobody was preventing you from cross-examining.

MR. PERSON: We only had a few days --

THE COURT: These are your own people.

MR. PERSON: But it has been continued, and I have an opportunity. We have not done this yet. This all has been continued.

THE COURT: You can submit affidavits from these people. These are your people.

MR. KLEINBARD: That is my whole point, your Honor. Why are we here on this question, which is really his question and which he should have documented?

MR. PERSON: It is a contract right that every one of these franchisees had to obtain NABCOR services which was interfered with illegally by conspiracy. They are entitled to recovery under that theory alone. This is illegal. It is a contractual right by contract.

THE COURT: That is a lot of generality.

We will adjourn tonight. I will treat Mr. Kleinbard's letter as a motion for reargument of the determination the other day. I want to have today's record before I decide the summary judgment motion, because there are a lot of things that were stated that were very useful to me, and I will reconsider the class action situation.

Are the full depositions on file?

MR. KAPLAN: Yes, your Honor. We have also offered to file the exhibits, and if your Honor will enter an order that we can provide you with, they are prepared and in a position to be filed tomorrow.

MR. PERSON: They are not full; they are only partial. There has not been an opportunity to have my side of it. I have not cross-examined any of these. It was continued.

THE COURT: I don't want to keep you, but there are two classes of people -- I hate to use the term "class" loosely -- there are the named plaintiffs, and then there are the others.

What I think I want to do is to focus harder on the depositions of the named plaintiffs and see what I can derive from that.

My problem has been that I feel a little at a loss because I don't have as much information as I would like about the absent people. But we will start with what we have got.

As far as your statement is concerned that the depositions and materials from the named plaintiffs are not adequate before the Court, that is really nobody's responsibility but your own. You have had the opportunity to submit affidavits. Nobody has prevented you from cross-examining. And, after all, these are your own people.

It would help me if the defendants would do one more thing and that is this: If they could prepare a memo summarizing what they consider to be the important points in these depositions.

MR. KLEINBARD: Right, your Honor.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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NATIONAL AUTO BROKERS CORP., et al., :

Plaintiffs, :

-against- :

GENERAL MOTORS CORPORATION, et al., :

Defendants. :

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70 Civ. 54214 (TPG)

SUPPLEMENTARY
AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

LEWIS A. KAPLAN, being duly sworn, says:

1. I am associated with Paul, Weiss, Rifkind, Wharton & Garrison, attorneys in this action for defendants General Motors Corporation, General Motors Acceptance Corporation, Frederic G. Donner and James M. Roche. I make this supplementary affidavit in opposition to plaintiffs' motions for orders determining that counts 1 through 8 and 14 through 27 of this action may be maintained as class actions.

2. On November 14, 1973 General Motors Corporation was served with an order of attachment and sheriff's levy against Nabcor which had been obtained by The Celina Mutual Insurance Company in an action in the New York Supreme Court. (Copies of the order and levy are annexed hereto as Exhibit 1.) I understand that similar orders and levies have been served on other defendants, including Ford Motor Company, Niagara Falls Gazette and Westchester-Rockland newspapers.

3. Subsequent examination of the file in Celina's New York action against Nabcor, and of the files in related

actions in several courts, has revealed facts bearing on the class action motions. These are described in the accompanying Special Memorandum in Opposition to Class Action Motions.

4. The purpose of this affidavit is to place before the Court several documents discussed in the Special Memorandum:

> Exhibit 2 is a copy of the affidavit (with exhibits omitted) of Joseph R. Brandes, vice president of Celina Mutual Insurance Co., which was filed in the New York Supreme Court, New York County, in support of Celina's application for the order of attachment against Nabcor.
>
> Exhibit 3 is a copy of an affidavit sworn to by Frank Maiorana and submitted in support of Nabcor's motion for an order restraining enforcement of the Celina judgment. The affidavit was filed in National Auto Brokers Corp. v. Celina Mutual Insurance Company, an action brought in the United States District Court for the Southern District of Ohio and voluntarily discontinued by Nabcor on or about April 25, 1973.
>
> Exhibit 4 is a copy of a Price, Waterhouse analysis of certain transactions between the Maioranas, Nabcor and two Nabcor subsidiaries. It was received in evidence as defendant's exhibit P at the hearing on Nabcor's motion for a preliminary injunction in this action. (Minutes, Apr. 10, 1973, at 317-18).

5. One other fact relevant to the Celina attachment bears mention. Mr. Person advised the Court, under date of December 7, 1973, that Nabcor had instituted an action in the United States District Court for the Eastern District of Pennsylvania to annul the Celina note and judgment. Mr. Person subsequently provided me with the docket number of that action and I have obtained a copy of the docket sheet through Phila-

delphia counsel. The docket sheet does not indicate that enforcement of the Celina judgment has been stayed or that any application for such relief *pendente lite* has been made.

Lewis A. Kaplan

Sworn to before me this

20th day of December, 1973

Notary Public

JA[illegible] C. AUSPITZ
Notary Public, State of New York
No. 60-0113[illegible]
Qualified in Westchester County
Commission Expires March 30, 1975

S-30N-5M-503010(67) [illegible]346

SHERIFF'S LEVY BY SERVICE OF ORDER OF ATTACHMENT ON GARNISHEE

LEVY: I HEREBY LEVY UPON AND ATTACH, to the extent necessary to satisfy the plaintiff's demand with interest, costs, and sheriff's fees and expenses, any interest of the defendant named in the copy of Order of Attachment served upon you herewith in personal property in your possession or custody and upon any debt you owe to the defendant, not specifically exempt from levy by law. This includes but it not limited to money, notes, bonds, checks and any other instruments for the payment of money, stocks and securities, a partnership interest, an interest in a decedent's estate or in any property or fund held or controlled by a fiduciary, any right or share in the stock of an association or corporation for which a certificate of stock is not outstanding, together with interest, dividends or profits accruing thereon and therefrom, and ten per cent of the gross salary or compensation payable by you periodically to the defendant.

EFFECT OF LEVY: This levy affects any existing debt, which is past due, currently due or yet to become due, certainly or upon demand of the defendant, wherever incurred, including any cause of action which the defendant can assign or transfer wherever accruing, and any existing personal property which the defendant can assign or transfer, whether it consists of a present or future right or interest and whether or not it is vested, including any debt or property specified in a notice accompanying the Order of Attachment; and, it also affects all property of the defendant hereafter coming into your possession or custody and all debts hereafter coming due from you to the defendant, until you pay, transfer or deliver the debt or property to the Sheriff. **YOU ARE FORBIDDEN BY LAW,** for ninety days after this service and for such additional time as the Court by order may provide, to transfer, pay over, or otherwise dispose of the debt or property so levied upon as hereinbefore specified to any person other than the Sheriff, except by written direction of the Sheriff. The Sheriff has and claims a lien upon the levied property for his statutory fees and poundage.

DEMAND: 1. I HEREBY DEMAND that you furnish me forthwith with a **STATEMENT, IN DUPLICATE,** specifying the amount and nature of any and all such property of the defendant, including the maturity dates of debts. If you do not, you are subject to examination under oath by direction of the Court.

2. I HEREBY FURTHER DEMAND that you forthwith transfer or deliver all such property and pay over to me all such debts upon maturity, and execute any document necessary to effect the payment, transfer or delivery. If you do not, you are subject to suit by the plaintiff to recover such property or the amount of your indebtedness, obligation or other accountability with costs and expenses.

DISCHARGE: Such payment or transfer or delivery shall discharge you from your obligation to the defendant to the extent of the payment, transfer or delivery. Make checks payable to the Sheriff, City of New York, and indicate the name of the case when remitting.

Dated, the 17 **day of** Nov 1973.

JOHN J. McCLOSKEY
Sheriff of the City of New York

Deputy Sheriff

Under Sheriff, in Charge
New York County Division
31 Chambers Street
New York, N. Y. 10007

At a Special Term, Part II, of
the Supreme Court of the State
of New York, held in and for
the County of New York, at the
County Courthouse, 60 Centre
Street, New York, New York on
the 13th day of November 1973.

OFFICE OF GENERAL COUNSEL

NOV 14 1973

P R E S E N T:

HON. SIDNEY A. FINE
JUSTICE

- X

THE CELINA MUTUAL INSURANCE
COMPANY,

Plaintiff,

-against-

NATIONAL AUTO BROKERS CORP.,

Defendant.

- X

ORDER OF ATTACHMENT

Index No. 19417/73

A motion having been made by the plaintiff for an Order of Attachment against the property of the defendant and the debts owing to the defendant, including causes of action, in an action in the Supreme Court, New York County,

NOW, on reading and filing the affidavit of Joseph P. Brandes, duly sworn to November 2, 1973, and the affidavit of [illegible] duly sworn to [illegible] 13/73 wherein it appears that a cause of action for a money judgment exists in favor of the plaintiff and against the defendant for the sum stated in the affidavit, namely, in the amount of one hundred fifty thousand ($150,000) dollars together with interest, and that the plaintiff is entitled to recover said sum over and above all counterclaims known to it;

And it being further shown by said affidavit that the plaintiff is entitled to an Order of Attachment against the property of the defendant and the debts owing to the defendant, including causes of action, on the ground that the defendant is a foreign corporation, and the undertaking required by law having been submitted herewith;

NOW, on motion of Messrs. Seward & Kissel, attorneys for plaintiff, it is

ORDERED, that the plaintiff's undertaking be and the same hereby is fixed in the sum of fifteen thousand ($15,000) dollars of which amount the sum of seven thousand five hundred ($7,500) dollars thereof is conditioned that the plaintiff will pay to the defendant all legal costs and damages which it may sustain by reason of the attachment if defendant recovers judgment or if it is finally decided that the plaintiff was not entitled to an attachment of the defendant's property, and the balance thereof conditioned that the plaintiff will pay to the Sheriff all of his allowable fees, and it is further

ORDERED, that the Sheriff of the City of New York, or the Sheriff of any county of the State of New York, levy, within his jurisdiction, at any time before final judgment, upon such property in which the defendant has an interest and upon such debts owing to the defendant, including causes of action, as will satisfy the plaintiff's demand against it of one hundred fifty thousand ($150,000) dollars together with probable interest, costs and Sheriff's fees and expenses and that he proceed hereon in the manner required by law.

ENTER within ten days,

[illegible]

J.S.C.

Index No.

SUPREME COURT : NEW YORK COUNTY

THE CELINA MUTUAL INSURANCE COMPANY,

Plaintiff,

-against-

NATIONAL AUTO BROKERS CORP.,

Defendant.

ORDER OF ATTACHMENT

SEWARD & KISSEL

Attorneys for Plaintiff.

63 WALL STREET
NEW YORK, N. Y. 10005
212 248-2800

Received 11-14-73
11:10 a.m.

SUPREME COURT : NEW YORK COUNTY

- - - - - - - - - - - - - - - - - - - x

THE CELINA MUTUAL INSURANCE COMPANY, : Index No. 19417/73

Plaintiff, :

-against- : AFFIDAVIT

NATIONAL AUTO BROKERS CORP., :

Defendant. :

- - - - - - - - - - - - - - - - - - - x

STATE OF OHIO)
: ss.:
COUNTY OF MERCER)

JOSEPH R. BRANDES, being duly sworn, deposes and says:

1. I am a Vice President of plaintiff, Celina Mutual Insurance Company ("Celina"), am familiar with the facts of this action and make this affidavit in support of plaintiff's application for the issuance of an order of attachment against such property in which defendant National Auto Brokers Corp. ("Nabcor" has an interest and against such debts owing to said defendant, including causes of action, as will satisfy plaintiff's demand against defendant.

2. Plaintiff is a corporation organized and existing under the laws of the State of Ohio.

3. Upon information and belief, defendant is a foreign corporation established under the laws of, and domiciled in the State of Pennsylvania. The basis of this information is defendant's allegation in its complaint against plaintiff filed in the

United States District Court for the Southern District of Ohio, Eastern Division, on April 10, 1973. A copy of that complaint is attached hereto as Exhibit A. Defendant Nabcor has dismissed this complaint.

4. On or about November 30, 1971 defendant executed and delivered to plaintiff a promissory note in the principal amount of $150,000.00. That note contained a warrant of attorney authorizing a confession of judgment. A copy of the said note is attached hereto as Exhibit B.

5. On November 30, 1972 defendant failed to pay the installment of principal and interest due under the said note and was thereby in default.

6. On December 8, 1972 plaintiff filed its complaint in the Court of Common Pleas of Franklin County, Ohio on the said note against the defendant and Consumer Auto Leasing, Ltd. ("Consumer"), the guarantor of the said note. By virtue of the warrants of attorney annexed to the note and the guaranty, an appearance of defendant and Consumer was entered and judgment was confessed in favor of plaintiff against defendant and Consumer in the principal amount of $150,000.00, with interest on that amount at seven percent (7%) per annum from May 31, 1972. A copy of the judgment is attached hereto as Exhibit C.

7. On January 22, 1973 defendant moved in the Court of Common Pleas of Franklin County, Ohio, to set aside the judgment and stay enforcement. In its papers submitted in support of that motion defendant admitted the execution of the note in question, and the jurisdiction of that Court to hear the matter.

8. Defendant was given an opportunity to contest the validity of the judgment of December 8, 1972 during the hearings held on its motion to set aside that judgment and to enjoin the enforcement thereof. In a judgment entered on February 14, 1973, the Court of Common Pleas of Franklin County, Ohio denied defendant's motion and authorized plaintiff to continue with any and all enforcement proceedings. A copy of the judgment is attached hereto as Exhibit D.

9. Defendant has not paid to plaintiff any part of the $150,000.00, plus interest, which plaintiff is entitled to recover against defendant by reason of the judgments of the Court of Commo Pleas of Franklin County, Ohio, dated December 8, 1972 and Februar 14, 1973. Payment of said sum has been duly demanded by plaintiff and refused by defendant. Said sum is due over and above all counterclaims known to the plaintiff.

10. By reason thereof, there is due and owing from defendant to plaintiff the sum of $150,000.00 together with interest on that amount at the rate of seven percent (7%) per annum from May 31, 1972.

11. Plaintiff has not made any previous application to this Court for the same or similar relief.

Joseph R. Brandes

Sworn to before me this

Second day of November, 1973.

Martha J. Johnsman
Notary Public
MARTHA J. JOHNSMAN, Notary Public
My Commission Expires February 5, 1977

Certificate Official Character, Etc.

THE STATE OF OHIO, Mercer County } COMMON PLEAS COURT

I, the undersigned Clerk of the Court of Common Pleas, a Court of Law and Record of said County, do hereby certify that Martha J. Johnsman *before whom the annexed* acknowledgment *was taken and whose name is subscribed in the certificate of proof thereof, was, at the time of taking the same, a* Notary Public *in and for said County, duly sworn and acting as such, and authorized to take the same; that she had authority to take the proofs and acknowledgments of deeds to be recorded in the State; that the impression of* her *official seal is not required by the laws of the State of Ohio to be filed in my office; and that* her *Commission expires* February 5 *19* 77. *And further that I am well acquainted with handwriting, and verily believe the signature thereto to be* her *genuine signature; and further, that the annexed instrument is executed and acknowledged according to the laws of the State of Ohio.*

In Testimony Whereof, *I hereunto subscribe my name and affix the seal of said Court at* Celina *Ohio,*

this 2nd *day of* November *19* 73

DWIGHT LAFFIN *Clerk*

By Ballenbacher *Deputy*

---

for the term of Five Years commencing on the 5th *day of* February *A. D. 197*2*, hereby authorizing and empowering h*er *to execute and discharge all and singular the duties appertaining to said office and to enjoy all the privileges and immunities thereof.*

In Testimony Whereof, *I have hereunto subscribed my name and caused the Great Seal of the State of Ohio to be affixed at Columbus this* 5th *day of* January *in the year of our Lord one thousand nine hundred and* Seventy-two

John J Gilligan

By the Governor

Secretary of State

DWIGHT LAFLIN, Clerk

JOHN J. GILLIGAN

Governor of said State

To all to whom these Presents shall come, Greeting:

Know Ye, *That by virtue of the authority vested in me by th* *Constitution and Laws of this State, and reposing special Trust and Confidence i* MARTHA J. JOHNSMAN *I do hereby appoint and commissio* *h*er *to be a* **Notary Public,** *for the count*y *of* Mercer *for the term of Five Years commencing on the* 5th *day of* February *A. D* *197*2*, hereby authorizing and empowering h*er *to execute and discharge all an* *singular, the duties appertaining to said office, and to enjoy all the privileges and immunities thereof.*

In Testimony Whereof, *I have hereunto subscribed my nam* *and caused the Great Seal of the State of Ohio to be affixed* *Columbus, the* 5th *day of* January *in the year of our Lord one thousand nine hundred and* Seventy-two

John J. Gilligan

By the Governor

Ted W. Brown

Secretary of State

The State of Ohio, } ss.
Mercer County, }

I do hereby swear that I will support the Constitution of the United States of America, and the Constitution of the State of Ohio, and that I will faithfully discharge the duties of **Notary Public**, *to which I have been appointed, according to law, and to the best of my ability*

Sworn to before me, a Notary Public
in and for the County aforesaid, this 7th *day*
of January *19* 72

Frances Taylor
FRANCES TAYLOR, Notary Public
MERCER COUNTY, OHIO
My Commission Expires February 2, 1973

IMPORTANT--Commission must be recorded in office of County Clerk before notarial acts are performed.
(Section 147.05 of the Revised Code of Ohio)

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF OHIO

EASTERN DIVISION

National Auto Brokers Corp.

Plaintiff

Vs.

No. 73-149

Celina Mutual Insurance Co.

Defendant

AFFIDAVIT OF PLAINTIFFS PRESIDENT

STATE OF NEW YORK

COUNTY OF NEW YORK

Before me, a Notary Public, in and for said County and State, appeared Frank Maiorana, to me known to be the President of Plaintiff Corporation, who, being duly sworn, avers as follows:

1. That Plaintiff and Defendant entered into an agreement under which Defendant assigned to Plaintiff a security interest which the Defendant held in accounts receivable of a businessknown as "Charge-A-Car Systems, Inc.".

2. That, as part of the agreement, Plaintiff executed and delivered to Defendant a Promissory Note with a Cognovit provision providing for the payment of One Hundred Fifty Thousand Dollars, plus interest, to Defendant.

3. That Defendant's representatives represented to Plaintiff that the accounts receivable were worth approximately Two Hundred Twenty Thousand Dollars with approximately One Hundred Fifty Thousand Dollars immediately collectible.

4. That Plaintiff reasonably relied on the representations of Defendant knowing the Defendant to be a major creditor of the said Charge-A-Car Systems, Inc., and knowing Defendant also to be a large stockholder and to have representation on the Board of Directors of the said Charge-A-Car Systems, Inc.

5. That Plaintiff subsequently learned that there were substantial cross-claims and offsets against the accounts receivable, rendering them, to all intents and purposes, valueless to the Plaintiff,

6. That Plaintiff had planned to join in a venture to acquire the assets of the said Charge-A-Car Systems, Inc., and that these plans were abandoned

BEST COPY AVAILABLE

before any default on the promissory note.

7. That, despite the specific provisions of the promissory note, Defendant took judgment for the face amount of the note in the Court of Common Pleas of Franklin County, Ohio and is now seeking to enforce that judgment in the Court of Common Pleas of Montgomery, Pennsylvania.

8. That Plaintiff has never been afforded the opportunity to present any defense against the note, in any jurisdiction.

9. That Plaintiff stands to suffer irreparable injury if Defendant is not restrained from further actions to execute on the judgment it obtained in this matter.

10. Further affiant avers not.

FRANK MATORANA

Subscribed and sworn to before
me this 6th day of April, 1973

Carl E

Notary Public

[illegible]

BEST COPY AVAILABLE

If this is something that you feel should be part of the consideration of the class action motion, then I will hold the class action motion. I have gotten the material about the attachment and that I have for the sake of the class action motion.

MR. KLEINBARD: Right.

THE COURT: If there is anything in this other development, I suppose it is kind of up to you whether you want to present it as part of the class action motion or not.

MR. KLEINBARD: They are really independent matters. In other words, your Honor would be able to decide the class action motion because you have the information concerning the Salina judgment. This motion really would be directed to whether the conduct of the plaintiffs has been so reprehensible as to independently --

THE COURT: Let's try to get the class action motion and the summary judgment motions out of the way. Whenever you want to file this new thing, well, that is up to you, but I will treat that independently.

Now, on the class action motion we get, it seems to me, Mr. Person, into a more and more difficult area as far as the financing of this action. There was a statement in that offering circular which indicated, at least implied, that NABCOR had to put up some money to finance this action. Then we have a fairly substantial record about NABCOR's financial difficulties. Then we have this new turn of events which shows up an attachment for $150,000 for an unpaid note.

MR. PERSON: Which is being contested, your Honor.

THE COURT: All right, but it isn't defeated. What is the situation as to financing the action? How is it being done?

MR. PERSON: Strictly on a contingent basis, your Honor, so that I receive no legal fees for this, which you were informed, so that they don't have the same burden that other plaintiffs have in an action. The burden is on me, not on the clients.

THE COURT: We covered this before, but please refresh my memory. How about disbursements?

MR. PERSON: They covered the disbursements. They cover expenses.

THE COURT: How much disbursements have there been so far?

MR. PERSON: I guess close to $4,000 or $5,000.

THE COURT: Have they carried that?

MR. PERSON: They paid me, I think $4,000 or --

THE COURT: Is it NABCOR or the other plaintiffs?

MR. PERSON: NABCOR.

THE COURT: You are not looking to the other plaintiffs for disbursements?

MR. PERSON: No. They paid their own expenses.

THE COURT: What if the future disbursements are extensive, what is your assurance they will be covered?

MR. PERSON: I don't know how a class action can do that. I don't know if it is required that we give bonds of performance. We have carried the case for three and a half years and we intend to continue this thing. The mere fact that we can't spend as much money as GM I don't think makes us ineligible.

THE COURT: You have a case in which the plaintiff claims that he is being put out of business by an Anti-trust violation. He may scrape along and do the best he can. It is understandable that he might not be too flush with funds, but the only thing is whether he should be permitted to carry on a class action for the benefit of 200 or 300 other people. That is a different story. Nothing says that an impecunious plaintiff can't sue for his own causive action and do the very best he can on that. It is a little different question of whether he should be entitled to purport to represent a lot of other parties as a class.

MR. PERSON: Bear in mind that the other people allegedly were deprived financially because of the same actions that we are complaining about. I think that it should be seen that these smaller plaintiffs don't have the economic power themselves to maintain it, so that the action has to be maintained by NABCOR. I mean, this is the only one who can come forward and do it and they have done it for a good number of years. The proof is the fact that we have survived this long. I don't know whether we can keep the question open forever. Maybe the question should go back to the time to which the class action should have been made. The allegations back to the time they were brought showed substantial ability to bring the proceedings. I do question opening it up throughout the three and a half years worth.

Blt.9

THE COURT: There is no question you have appeared and carried it on.

MR. PERSON: I would like to make a motion myself striking any allegations that relate to the class because of Paul Weiss' contact with the attorney for those members of the class in violation of your order. I think this is a companion motion.

THE COURT: What is your motion, to strike --

MR. PERSON: And other sanctions. They are making a motion --

THE COURT: Then you are going to respond?

MR. PERSON: I am going to respond with a motion for sanctions and to be entitled to discovery, too. They obtained discovery from me. The issue is that they are dealing with the counsel for the class where the counsel won't even communicate the offer to their client but communicates the offer directly to GM. These members of the class aren't independent. They are being used here by the counsel.

MR. KLEINBARD: May I just be heard on this question of costs? I think Mr. Person is sort of glossing over a very substantial aspect of this case. In our main brief and, of course, there is so much material before your Honor that I cannot possibly expect your Honor to be carrying it all in your head, we pointed out that NABCOR's records for only a part of the period during which this action has been pending show that it has already spent $37,000 on these proceedings, so any notion --

THE COURT: Where is that?

MR. KLEINBARD: That is Page 12 of the joint memorandum of the various defendants. Any notion that the disbursements here have amounted to $4,000 is utterly unbelievable.

THE COURT: Where does it say $35,000?

MR. KLEINBARD: At the bottom of Page 13, your Honor, of our joint memorandum. The figure is $37,000.

MR. PERSON: I am not talking about what has been spent, your Honor. I am talking about what I spent. Those are normally my disbursements.

THE COURT: That is what I asked about. I asked you, Mr. Person, because I wanted to get an idea of the burden that was having to be borne by NABCOR.

MR. PERSON: I don't know the amount that they have spent in this action.

THE COURT: What are they required to spend to carry it on? If they have already spent $37,000, I assume they spent it because it was necessary. Can they keep on spending money and providing the necessary support for this action?

MR. PERSON: You know, I can't say that they have the money in the bank to put out right now for expenses to be met five years from now. We have been able to maintain it so far and expect to continue.

THE COURT: What was the $37,000 spent for?

MR. PERSON: He has the records. A lot of expenses may be -- I honestly don't know. They have the records.

THE COURT: Are they advancing you fees?

MR. PERSON: Absolutely no fees whatever. I am doing this strictly on a contingent basis.

MR. KLEINBARD: In addition to that, your Honor, you have before you as an exhibit to the affidavit in opposition to the class action motion a financial statement of NABCOR itself, which is Exhibit 34, I believe, which shows for a nine-month period ended October 31, 1971, for $20,600. That doesn't surprise me, that these figures could be as substantial as they are because you can't engage in litigation of this character and have a great many depositions, transcripts and all of the other expenses that go with this thing and not be facing a great many thousands of dollars of litigation expense.

THE COURT: I don't know whether you could. I don't understand these high figures if Mr. Person is on a contingency basis. I just wonder whether these figures are true.

MR. PERSON: Officers' salaries are an allocation if the officer spent 60% or 30% on --

MR. KLEINBARD: And is a very unusual thing. That is a form of accounting with which I have been heretofore totally unfamiliar.

Just one more point, and I don't want to belabor the record. I think I have made the demonstration I want to make with respect to what certainly seemed to be past disbursements and certainly anticipated disbursements. This is not a goods sold and delivered case involving a car.

Another thing I want to point out again is the perilous position we are subjected to if it should later turn out that Mr. Person's client is an inadequate representative in going along here and spent God knows what defending this thing and if it is inadequate to represent the class, we are going to be stuck with having a litigation that has gone on for four or five years and having to start all over again. This is a very serious consideration. The judgment will not stand with collateral attack. That is what I am concerned about. We can't go all the way to judgment with an inadequate plaintiff's representative.

THE COURT: I think we can protect you against that.

Let me ask you this: In the many briefs that have been filed in the class action motion there have been numerous cases about class action treatment or denial of class action treatment in Anti-trust cases where you stated the Mobil case up in New Hampshire and that kind of thing. The thing that I think I have got to resolve is the thing that I mentioned many times in the discussions, and that is whether those cases really apply to a situation where you have got an alleged organization. You don't just have a lot of independent people, buyers or gasoline dealers throughout some given area. You've got an allegation, at least, of an organization.

Pardon me if there is something sitting prominently in your brief that I should remember and don't,but if you have, either of you, a case dealing with class action treatment in respect to a franchise organization or anything close to it to illustrate whether the Court should be more liberal or no more liberal than where you have got a class of just unassociated independent people?

B1t10

MR. KLEINBARD: Your Honor, may I just say while Mr. Kaplan is looking for the case, that I think the heart of the difficulty here has been the assumption, and we start at opposite ends of that assumption, that you are dealing here with a group or an organization. It is our point, and I think that is where the difficulty is, the brokers or licensees are not a highly independent, identifiable and standard group of businessmen such as you have in McDonald's and the other franchisees.

I think that is perfectly apparent. I think, using your Honor's term, these are dispersed and disparate people located all over the country.

THE COURT: I think we have discussed this before. One problem is if that is a question of fact, then how do we approach the question of fact? It is alleged in the Complaint that there are so many franchisees, past and present. Undoubtedly, there is a question of fact as to whether there is such a thing as to whether any individual person is a franchisee, want a franchisee, wants to participate in the action, and so forth. But the problem that I have always had, and I won't repeat this, is whether I can simply assume that everything is in the negative and deny class action treatment or whether we shouldn't have some device to ascertain the facts since we are not talking in theory and if this ever goes up to the Court of Appeals I would imagine it would be a little better to have the record a factual one rather than a theoretical one. But I won't belabor that because we have discussed that several times, your Honor, in the past.

THE COURT: Just on the question of the point of law --

MR. KLEINBARD: I think the cases, your Honor, that appear at Pages 50 and 51 of our supplemental memorandum come as close to this situation as we can come. There is obviously no case precisely like this one.

THE COURT: You are talking about Pages 50 and 51?

MR. KLEINBARD: Yes, the Chicken Delight and the Mobil case, the Abercrombie case and the Shell Oil and the Gaines cases.

THE COURT: Okay.

MR. KLEINBARD: They are obviously not identical, your Honor, because this is a rather unique case, but I think we have asserted general principles in this case to be of assistance to your Honor.

THE COURT: One final question is this and I think this is somewhat to Mr. Person: The more I look at this discovery in the case, the summaries and so forth, the more it strikes me that NABCOR may have a different type of a claim than the brokers and I would not want to go off on some highly technical or artificial ground.

Let's say that the action was brought only by NABCOR. Have you got any case which really illustrates the fact that NABCOR can represent its franchisees? Can a franchisor represent its franchisees? Again, something may be right in the middle of the briefs prominently.

MR. PERSON: There is a case where the underwriter of a security was permitted to represent people who bought securities. It begins with an R. It is in one of my much earlier memos.

MR. KAPLAN: The name of the case Ruckler, 52 Federal Rules Decision, and the case stands for the proposition that the underwriter who also purchased securities could represent the class of purchasers of securities, not for the proposition that an underwriter who was not a purchaser could represent people who were .

THE COURT: That is a kind of Parens Patriae case.

In order to represent a class -- for instance, the Robinson-Patman Act claims -- we have hashed this over at length -- in most cases by your own admission would not lie with the brokers at all. The brokers are in a completely, utterly distinct position from NABCOR. That is just one indication to me that to talk about NABCOR representing all these brokers -- again, maybe I am approaching it over-technically because it may be something of substance.

MR. PERSON: We have tried to reduce it in our papers to the issue of whether the conspiracy was to injure NABCOR. We take the next step and that is the franchisees then all suffered as a result of the inability of NABCOR to give the services promised to these people, so the question of what losses they suffered we do not represent them. What we do represent them in is in the issue of whether or not there was a conspiracy to get NABCOR. That is the essential issue on which the recovery by all is hinged.

THE COURT: NABCOR is in a different position from the franchisees, simply by the fact of one being a franchisor and one being a franchisee. That is a distinction in itself.

MR. PERSON: That is for damages. We don't represent them in damages, just the issue of liability.

THE COURT: Then NABCOR occupied this position of the supplier of the cars. NABCOR would buy, at least under standard operating procedure, the cars and then sell them to the people as has been outlined. So NABCOR occupied really a substantially different role in the whole pattern of the transaction. NABCOR was the head of the organization. It was selling the franchises and all of that.

Now, I really wonder about even the identity of the claims.

MR. PERSON: There is nothing to have

competitors representing each other, so that it isn't unusual to have people you are out to kill in business go in and represent you in a class. It is the issue which we are representing them on, the issue of liability, of whether GM and the others conspired to injure NABCOR. The result of that is a question of fact, of whether an individual NABCOR franchisee in fact was damaged in a provable amount. We don't represent him in that. We are tailoring it to the representation of the class for liability only. That is a simple issue.

THE COURT: What brings this to my mind, in going over the discovery as to the individual broker plaintiffs I do not see how any of those people taken as an individual broker could represent other brokers. I am sure you disagree with that, but to me they are admissions and I don't see any one of them that I could conscientiously say could represent a class. We are talking about the brokers.

Blt.10 If you eliminate those people as class representatives you are left with NABCOR and I inevitably come to the question of how can NABCOR represent brokers, because I wonder if their situations are similar enough to the types of claims or would be similar enough.

MR. PERSON: The claim comes after. It is the issue of liability that we are seeking to establish first of all .

THE COURT: I don't get you.

MR. PERSON: The first step is whether there was a conspiracy to get NABCOR. If in fact there was, we take the next step that there were injuries as a result of that caused to the franchisees in an amount which they would have to come in and prove separately. We are not representing them in that. We are trying to give them the opportunity for their claim. By establishing liability -- it may be just an issue of liability -- if they intentionally conspired to affect the franchisors, there is liability for those people who can prove that they were damaged by it.

THE COURT: Mr. Kleinbard, have you got any authority either in your papers or outside about a franchisor representing franchisees?

MR. KLEINBARD: In the Billy Baxter case, your Honor, which I think is in a footnote on Page 39 or 40 -- it is a standing case, but it indicates --

THE COURT: What does that case say and where is it, so we can find it?

MR. KLEINBARD: Page 42 of the main brief which indicates, which stands for the proposition that if your injuries result from the effects on your franchisor of alleged anti-trust violations, that the franchisees do not have standing to bring suit. That is precisely the situation at Page 42 of the main brief.

THE COURT: All right.

MR. KLEINBARD: That is pretty much the situation here, although geared to standing.

Of course, Mr. Person assumes that you can fragmentize the questions here in the fashion in which he has. He also assumes, in answer to the question, after you assume a conspiracy, that the so-called failure to perform by NABCOR had a uniform result across the class of NABCOR's brokers or licensees and, as your Honor has observed from reading the supplemental memorandum, the results of any even assumed conspiracy, even if we put to one side the question of standing, were entirely different and there is no reason to suppose that the situation is different with respect to any of the other brokers.

Another question, which of course was not answered was, whether, again assuming conspiracy and standing, that the injury, if any, to the particular broker or franchisee was caused by the conspiracy, and once again, the brief I think demonstrates a complete failure of proof on that score, and finally --

THE COURT: I guess Billy Baxter wouldn't be precisely what I asked. Do you have any cases about whether a franchisor can be a class representative of franchisees? Has that been litigated before?

MR. KLEINBARD: I am not aware of one, your Honor, but certainly whatever the rule might be in general, I don't think your Honor can overlook in this particular case the presence of litigation between the franchisor and the franchisee which results in an inherent conflict between their positions because, as I believe we have pointed out -- it will only take me a second to mention it -- it would be NABCOR's position and, indeed, it has been NABCOR's position in all of these lawsuits that they did not fail to perform and they were therefore not injured by the conspiracy.

The six named brokers who have testified thus far have all indicated that NABCOR did not fail them in any particular case, but nonetheless you have these lawsuits pending and you have incentive on NABCOR's part to assert in those lawsuits and others that it was not injured by this conspiracy or affected by this conspiracy. so you have a conflict in the very representative that would be left, namely, NABCOR, and I don't see how you resolve that conflict in this case.

THE COURT: What does the conflict mean in the lawsuits by the franchisees and --

MR. KLEINBARD: They allege that NABCOR failed to perform whatever services which NABCOR said it was going to do, so NABCOR has uniformly said in all of those lawsuits, "No, we didn't fail to perform. We gave you everything that you wanted, everything that we agreed to supply."

I am saying that whatever the situation might be in a plain and simple franchisor-franchisee situation without the colorization of the existence of these lawsuits, here it is different because you have NABCOR with an incentive at least in every one of these litigations to take the position and, indeed, they have taken the position that they did not fail to perform. That produces a very, very different situation, your Honor.

THE COURT: Okay, I will give you back your transcript. Thank you.

* * *

action against Nabcor in obvious collection of some kind of judgment against Nabcor and the other parties to the Celina agreement. The quality of Mr. Kaplan's work to date suggests only that Mr. Kaplan and his law firm were fully aware of the Judgment against Nabcor, and this probably resulted in Celina serving an attachment order on various defendants in the action. Discovery should show the extent of defendants' cooperation in the effort to trump up financial information against Nabcor. When did Mr. Kaplan or his law firm or clients learn about the Celina Judgment? Plaintiffs would like to know the answer.

30. In ¶ 5 of Mr. Kaplan's affidavit, he says GM and GMAC were served with an order of attachment by Celina in November, 1973. He does not mention defendant GMAC's and GM's participation in the Celina transaction, facts of which he obviously must have had at the time. The facts cry out for discovery of the precise date when GMAC, GM and their attorneys or accountants first learned of the Celina Judgment, and what actions they took when they obtained the Celina Judgment documents from Nabcor on March 13, 1973. Plaintiffs urgently request discovery in these respects.

31. Mr. Kaplan refers to numerous documents on file in various courts relating to the Celina Judgment, but significantly fails to mention the Celina-Nabcor documents delivered to him by Nabcor on March 13, 1973 in accordance with the Court's oral direction during the evening of March 12, 1973 (see Exhibit A hereto). The reasons seem obvious - Mr. Kaplan's wilful attempt to mislead the Court once again.

32. We note that no reference is made in defendants' motion to Nabcor's settlement negotiations by Nabcor's Philadelphia attorneys with the attorneys for 3 Nabcor franchisees in Philadelphia. The Court will recall that Mr. Kleinbard advised the Court of how terrible affiants'

actions were in suggesting a possible settlement offer with respect to 3 Nabcor franchisees who brought suit, using Ford Motor Company's Philadelphia antitrust attorneys (affiant adds). Affiant stated at the time that Mr. Kleinbard's own law firm has much to account for in this regard, and that affiant would seek appropriate relief from the Court in the event such a motion were made. Quite significantly, it seems, Mr. Kleinbard did not make the threatened motion, for obvious reasons. As the Court may recall, the 3 Nabcor franchisees (Messrs. Gerson, Gerson and Mesirov) are represented in their 2 actions against Nabcor by Ford Motor Company's attorneys, Messrs. Mesirov (an uncle of one of the 3 Nabcor franchisees), Gelman, Jaffe & Levin. It would seem difficult for defendants to argue in the threatened motion that contact by Nabcor's Philadelphia attorneys with defendant Fords' attorneys in Philadelphia is an improper contact with the 3 Nabcor franchisee who are suing Nabcor (especially when the franchisee's attorneys refused to communicate the Nabcor offer of settlement to their 3 clients, and communicated the offer immediately to Mr. Kaplan, GM's counsel, instead). Plaintiffs would like to obtain discovery of defendants and their counsel and others to ascertain the extent of their affiliation with the Mesirov law firm to see if GM has been in further violation of the Court's written order. An obvious instance of violation is Mr. Kaplan's contact with attorney Stein of the Mesirov firm, who (according to Nabcor's Philadelphia attorney, Ronald H. Israelit, Esq.) reported to Mr. Kaplan (but not his own clients, Messrs. Gerson, Gerson and Mesirov, all Nabcor franchisees) that Nabcor's Philadelphia attorney had made a settlement offer including a partial assignment of the 3 Nabcor franchisees' claims against defendants herein (but only to the extent of Nabcor's payment to the franchisee under the settlement agreement, after allowing the franchisees an opportunity to obtain full recovery of any unrefunded part of his original Nabcor franchise fee. See Exhibit E hereto for various documents relating to this sorry story. Included among the documents is my own letter to Mr. Israelit, dated December 18, 1973, which said in relation to the proposed settlement: "It isn't necessary for the Nabcor suit, but would allow Nabcor to recover the moneys it plans to lay out in the Mesirov settlement." Plaintiffs seek disclosure of the extent of defendants' violation of this Court's written order not to communicate with members of the Nabcor franchisee class. Also, the discovery would be directed to the obvious issue of whether the 3 franchisees were encouraged by defendants to bring suit against Nabcor for the very purpose of using their testimony as "evidence" that Nabcor had defrauded its franchisees. The Court may remember that even though GM noticed the 3 franchisees for deposition, the deposition of Mr. Mesirov revealed that he was advised by his counsel (Ford Motor Company's own Philadelphia antitrust attorneys) that Mr. Mesirov had no claim against any of the defendants, that he had not seen a copy of the Nabcor complaint, and that he had not been advised that his own attorneys were also the attorneys for Ford Motor Company in other antitrust actions against Ford Motor Company. These disclosures must have prompted GM to terminate the scheduled depositions for the other Nabcor franchisees. Nor did GM use the discovery period granted to it to depose EVEN ONE NABCOR FRANCHISEE who was not a plaintiff herein. The reason for GM's reluctance to depose any unrelated Nabcor franchisees is that they would undoubtedly wish to have Nabcor and the other plaintiffs represent them in this action. GM has consistently opposed any giving of even the slightest form of notice of this action to any of the unrelated Nabcor franchisees. Isn't it time that some of these Nabcor franchisees be heard from?

Right now it is a very --

THE COURT: All right, let us put off answers for the present.

I would like to hear from Mr. Person. Whether it is next week or the week after, your discovery is going to start.

MR. PERSON: Yes.

THE COURT: What discovery have you taken so far?

MR. PERSON: Your Honor, we have had very little discovery.

THE COURT: I know.

MR. PERSON: I think the only discovery we had was two or three documents relating to the fleet program, which we thought was very minimal, and you had said try to get the essence of the program. You didn't direct them to delivery everything they had. So we have had very little, and we would like to obtain documents, obtain answers to the interrogatories.

THE COURT: Let me just go backward. I am not acquainted with or reviewed the file in this respect.

Have you served any document demands?

MR. PERSON: None.

THE COURT: Or interrogatories or notices of deposition at all on any defendants?

MR. PERSON: Yes. We have served what had been entitled "Class Action Interrogatories," many of which are still relevant. But I would have to go back and see, in light of the decision denying the classes, the extent to which the interrogatories are still relevant. We have not served a notice to produce other than in connection with our colonial matters, so that we don't have any outstanding notices to produce. But we do have outstanding interrogatories. We have served no notices of deposition other than in the Wilmington Trust affair, which took place in Delaware. That was several years ago, we had depositions there, which were not fruitful.

We need documents and the answers to interrogatories before we would proceed with the depositions, your Honor.

THE COURT: It seems to me that we have got to get your discovery started, and it seems to me also we have got to have the discovery organized.

In order to get it organized, it would seem to me that we have to take the depositions of the plaintiffs in this action, and I would think that they would be the best clue as to what discovery the plaintiffs are entitled to. In other words, if a particular plaintiff has said that he was denied automobiles by a particular broker, that is a clue as to what discovery that plaintiff might be entitled to.

MR. PERSON: We have set that forth in the complaint and also in the preliminary injunction motion. We have an enormous amount of material in that regard.

THE COURT: What do you mean an enormous amount of material?

MR. PERSON: We had thirty-three instances where GM dealers had refused us automobiles. So that we have at least in that instance detailed thirty-three different dealers.

THE COURT: But that is pretty much amended by the depositions.

I just think, in order to keep this from just being a rampage of disorganized voluminous discovery, we have got to keep a rein on it and I intend to do so.

I think that, as I said in the decision I handed down a week or so ago, the claims that actually come out of the mouths of these plaintiffs are a lot different from what is in the complaint. I would take those claims as stated in those depositions and the testimony of those plaintiffs as the starting point for the discovery that you are entitled to. Because what is set down in this complaint bears very little resemblance to what came out of their mouths.

MR. PERSON: Your Honor, the motions were tailored by the defendants, not me. So that our complaint, you will

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find, will be backed up by the evidence that will be produced. If they fail to ask the right questions --

THE COURT: I don't see that you are responding to me.

MR. PERSON: The complaint is still going to be backed up by evidence that we have. We have submitted an enormous amount of evidence backing up the complaint in the form of answers to interrogatories. So that the fact that the defendants chose not to refer to that is one of the problems that --

THE COURT: What do you mean not to? You are saying that their summary was inaccurate?

MR. PERSON: Yes, I think in many areas. We have quite a lot of instances which do -- in other words, everything in the complaint is backed up. They did not choose to back it up in the papers they made to you, the motion papers that they served. But we do have an enormous amount of evidence, and I think the complaint is really what I would like to try to prove in trial. I think that it details the areas that I need to go into.

THE COURT: Mr. Person, when you have got admissions from a plaintiff that he never attempted to get a single car, you can have a lot of proof but you can't prove more than that man has admitted, it seems to me.

MR. PERSON: We have for weak brokers people who did not go far, who were stopped in connection with what they were trying to do. They were not Turco, they were not like General Auto, they were not like NABCOR. So we do have several people. But that hardly is what NABCOR and several plaintiffs are complaining about. They did have a substantial number of cars, they were in fact in the business for years. So that there has been a spectrum of business activities. And they are focusing upon the few weak ones and saying that is evidence of it all. Well, that hardly is. The evidence really backs up what is in the complaint.

The fleet program we really can't give testimony on. It is General Motors and the other three that have to give evidence relating to the fleet program. I think we need an enormous amount of discovery, because a lot of the case may --

THE COURT: No, Mr. Person, the word "enormous" just isn't going to apply. This case is a relatively simple case. It is not going to be, as far as I can do anything about it, magnified by the plaintiffs or the defendants beyond proportion.

MR. PERSON: I am not trying to magnify it.

THE COURT: It is coming to trial next fall and that is that.

What I would like you to do in preparation for next week's meeting is this: There may be a small amount of additional discovery that the defendants need, but the main thing is to get your discovery organized and get it done.

In preparation for a meeting next week, I would like to have you circulate to the defendants -- and don't fire off notices of document production or hundred-page lists of interrogatories or any of that stuff -- a memorandum, please, detailing what discovery you want. Try to specify if you can the kind of documents that you are going to request from whom, the persons whose depositions you wish to take, and the parties against whom you think you want to direct written interrogatories, and the subjects for those interrogatories. If you could put that into a memorandum, I imagine you have thought a lot about this before, and you can put that in a memorandum and you can give it to the defendants in advance of the meeting next week, that would be fine.

That does not give a lot of time for mail, but maybe if Mr. Person could deliver a copy of that memorandum to Paul,Weiss, and you could act as liaison, it would help. I think I am going to ask you to do this in some of these short notice stipulations.

MR. KLEINBARD: We have been doing that, your Honor.

THE COURT: You have. All right. Then deliver a its date; (iii) the name and address of its author and each addressee; (iv) its substance; and (v) its present location or custodian and

(d) when used with reference to an oral communication (i) state the date on which it occurred; (ii) identify each person who was present when it was made; (iii) state its substance and (iv) identify each document which refers thereto. In lieu of stating the substance of any document or writing, a copy thereof may be annexed to the answers to these interrogatories.

3. "Person" shall include natural persons, corporations, partnerships, public corporations, municipal corporations, state governments, local governments and other governmental bodies.

Time Period

These interrogatories are to be answered for the period commencing January 1, 1966.

Interrogatories

1. State in detail the factual basis for the averments of paragraph 111(b)(5)(a) of the complaint insofar as they relate to Citibank, and

(a) identify each Nabcor franchisee and customer thereof who was allegedly refused financing by Citibank and with respect to Nabcor and each such Nabcor franchisee or customer thereof specify:

(i) the date on which financing was sought from Citibank by Nabcor or such

Nabcor franchisee or customer thereof;

(ii) the nature of the financing sought, specifying the dollar amount and the purpose for which the financing was intended;

(iii) whether Nabcor or the Nabcor franchisee or customer thereof submitted a written application or any other writing to Citibank in connection with its efforts to obtain financing, and, if so, identify the writing in a manner suitable for use as a description in a subpoena;

(iv) whether Nabcor or the Nabcor franchisee or customer thereof received any writing from Citibank in connection with its efforts to obtain financing and, if so, identify the writing in a manner suitable for use as a description in a subpoena;

(v) whether Nabcor or the Nabcor franchisee or customer thereof or any representative of Nabcor or of such franchisee or customer had any conversations with any officer or employee of Citibank or any representative thereof in connection with the efforts to obtain financing and if so identify:

(A) by name and title each participant in each such conversation,

(B) the date, location and duration thereof,

(C) all persons present thereat,

(D) the substance of each such conversation.

(b) describe in detail each other fact or communication, including hearsay, upon which the averments are based, identifying each person (by name, address, business or other affiliation and title) involved therein or present thereat, specifying the manner, substance and date and method (oral or written) of any communication, and identifying any document in a manner suitable for use as a description in a subpoena.

2. State in detail the factual basis for the averments of paragraph 111(b)(5)(b) of the complaint insofar as they relate to Citibank, and

(a) identify each individual who unsuccessfully sought a business or personal loan from Citibank in order to buy a Nabcor franchise and who was refused that loan solely because it was to be used to buy a Nabcor franchise, and for each such individual specify:

(i) the date on which such loan was sought;

(ii) the dollar amount of the loan sought;

(iii) whether such individual submitted a written application or any other writing to Citibank in connection with his efforts to obtain such loan, and if so identify the writing in a manner suitable for use as a description in a subpoena;

(iv) whether such individual received any writing from Citibank in connection with his efforts to obtain financing and if so, identify the writing in a manner suitable for use as a description in a subpoena;

(v) whether such individual or his representative had any conversation with any officer or employee of Citibank or any representative thereof in connection with the efforts to obtain such loan and if so, identify:

(A) by name and title each participant in such conversation,

(B) the date, location and duration thereof,

(C) all persons present thereat,

(b) describe in detail each other fact or communication, including hearsay, upon which the averments are based, identifying each person involved therein or present thereat, specifying the manner, substance and date and method (oral or written) of any communication, and identifying any document in a manner suitable for use as a description in a subpoena.

3. State in detail the factual basis for the averments of paragraph 111(b)(5)(c) of the complaint insofar as they relate to Citibank, and

(a) identify each potential Nabcor customer who was refused an automobile loan by Citibank unless he made his contemplated purchase from a franchised dealer and each Nabcor customer who was denied automobile financing by Citibank and for each such customer or potential customer specify:

(i) the factual basis for the averment that such person was a Nabcor customer or potential Nabcor customer;

(ii) the date on which the loan was sought;

(iii) whether the customer or potential customer submitted a written application or any other writing to Citibank in connection with his efforts to obtain a loan and if so, identify the writing in a manner suitable for use as a description in a subpoena;

(iv) whether the customer or potential customer received any writing from Citibank in connection with his efforts to obtain a loan and if so, identify the writing in a manner suitable for use as a description in a subpoena;

(v) whether the customer or potential customer or his representative had any conversation with any officer or employee of Citibank or any representative thereof in connection with his efforts to obtain a loan and if so, identify:

(A) by name and title each participant in such conversation,

(B) the date, location and duration thereof,

(C) all persons present thereat,

(D) the substance of each such conversation,

(b) describe in detail each other fact or communication, including hearsay, upon which the averments are based, identifying each person involved therein or present thereat, specifying the manner, substance and date and method (oral or written) of any communication, and identifying any document in a manner suitable for use as a description in a subpoena.

4. State in detail the factual basis for the averments of paragraph 111(b)(5)(d) of the complaint insofar as they relate to Citibank, and

(a) identify each potential Nabcor customer whom Citibank advised or convinced not to purchase from Nabcor or its franchisees but to purchase new automobiles from franchised dealers instead and for each such potential Nabcor customer specify:

(i) the factual basis for the averment that such person was a "potential Nabcor customer";

(ii) whether Citibank gave that advice orally or in writing;

(A) if the advice was given in writing identify the writing in a manner suitable for use as a description in a subpoena,

(B) if the advice was given orally identify:

(1) by name and title each participant in such conversation,

(2) the date, location and duration thereof,

(3) all persons present thereat,

(4) the substance of such conversation,

(b) describe in detail each other fact or communication, including hearsay, upon which the averments are based, identifying each person involved therein or present thereat, specifying the manner, substance and date and method (oral or written) of any communication, and identifying any document in a manner suitable for use as a description in a subpoena.

5. State in detail the factual basis for the averments of paragraph 111(b)(5)(c) of the complaint insofar as they relate to Citibank, and

(a) state whether Citibank ever described Nabcor or its franchisees as "illegitimate" or "bootleg" or as a "gypsy operation" and if the answer to this interrogatory is in the affirmative specify each instance in which Citibank so described Nabcor or its franchisee and with respect to each such instance:

(i) state the date and identify, by name and address, the person or organization to which that description was conveyed;

(ii) state whether that description was oral or in writing and if it was in writing identify the writing in a manner suitable for use as a description in a subpoena;

(iii) if Nabcor or its franchisees was so described by Citibank orally identify:

(A) by name and title each participant in such conversation,

(B) the date, time, location and duration thereof,

(C) all persons present thereat,

(D) the substance of each such conversation;

(b) describe in detail each other fact or communication, including hearsay, upon which the averments are based, identifying each person involved therein or present thereat, specifying the manner, substance and date and method (oral or written) of any communication, and identifying any document in a manner suitable for use as a description in a subpoena.

6. [illegible]e in detail the factual basis for the averments of paragraph 112A(11) of the complaint insofar as they relate to Citibank, and

(a) identify each Nabcor customer who was denied new automobile financing for the purpose of eliminating Nabcor and its franchisees as competitors of factory-franchised dealers who were obtaining automobile financing from Citibank and specify:

(i) the factual basis for the averment that such person was a "Nabcor customer";

(ii) whether Citibank received an oral or written request for financing;

(iii) whether Citibank denied the request orally or in writing;

(b) identify by name and title each officer or employee who participated in denying each application for new automobile financing; and

(c) identify each defendant and co-conspirator "combined or conspired with" by Citibank on each occasion mgs3

Now, what forms of discrimination are you claiming, Mr. Person? Are you claiming discrimination between one or more of the plaintiffs and franchise dealers? Is that part of the claim in Count 14?

MR. PERSON: The discrimination works both with respect to dealers and the leasing companies. That is, they are the favored persons.

THE COURT: So you are claiming that one or more of the plaintiffs is discriminated against in favor of franchise dealers; is that right?

MR. PERSON: Yes, your Honor.

THE COURT: Then secondly, one or more of the plaintiffs is discriminated against in favor of leasing companies; is that right?

MR. PERSON: That is correct.

THE COURT: All right.

Now, let's take the claim of discrimination in favor of franchised dealers. I don't see how it can be under 2-A, because the contribution is paid by the dealers. It is not a reduction in price in favor of the dealer, it is a payment extracted from the dealers. I mean just by its terms, I don't see 2-A. Do you claim 2-A?

MR. PERSON: Well, it is a payment that is collected from the dealer, that's true, and it is paid over by the manufacturer into an advertising organization, territorially on behalf of those dealers.

THE COURT: Well, look, you have alleged, you have included in your recital at the end of the count, Sections 2-A, 2-B, and 2-E of the Robinson-Patman Act. Now, which of those sections do you claim applies to your claim of discrimination in favor of the dealers?

MR. PERSON: It is an instantaneous rebate, so in other words I don't know whether to call --

THE COURT: What do you mean, an instantaneous rebate? Is it rebated to the dealers?

MR. PERSON: No, it is rebated for the benefit of the dealer. It is an instantaneous --

THE COURT: Do you claim that that form of discrimination comes under 2-A?

MR. PERSON: I put that in just to be safe. In other words, I wanted to, you know, I don't know if --

THE COURT: Look, I assume you've thought about this. Now what is this claim under?

MR. PERSON: It is a mandatory payment which we have to make which the manufacturer allows to go for the benefit of the dealer.

THE COURT: Look, Mr. Person, this action has been pending for two years or more. Well, it has been pending a lot longer than that. It has been pending three and a half or three and a quarter years, and I've got to find out what the issues are. And it makes a difference whether a claim is under a particular statute or another particular statute.

Now, I don't want to be peremptory in cutting certain claims out, but I've got to have a rational basis, know some rational basis for keeping something in. Now, is there any basis for saying that this particular kind of discrimination is under Section 2-A of the Robinson-Patman Act?

MR. PERSON: The effect of it is that we wind up paying more for -- we wind up paying the same, but getting less. There is in effect a --

THE COURT: Paying the same but getting less in what? Advertising services?

MR. PERSON: Right.

THE COURT: All right. So isn't that a 2-E problem if it is anything?

MR. PERSON: Well, I was unsure because of the way that payments are juggled around, in effect. But the end result of it is that we wind up getting no advertising services.

THE COURT: Isn't your claim in essence that General Motors contributes this advertising fee which it is obtaining from dealers, takes that fee and gives it to some dealer association to be spent on advertising for the benefit of the dealer? Isn't that your claim?

MR. PERSON: That is correct.

THE COURT: All right. And you say it benefits the dealer who is in competition with Nabcor; is that right?

MR. PERSON: That's right.

THE COURT: And it doesn't benefit Nabcor.

MR. PERSON: That's right.

THE COURT: So if it is anything, it is a 2-E claim.

MR. PERSON: Yes, your Honor.

THE COURT: Well, I am going to, with respect to the Count 14 claim of discrimination in favor of the dealers, we will initially cut out the reference to Sections 2-A and 2-B and we will limit it to Section 2-E.

Now let's explore a 2-E claim of that kind. What is the basis for saying that 2-E requires, or prevents General Motors or Ford or any of the other auto defendants from taking a contribution of this kind and employing it for the benefit of their own franchised dealers?

MR. PERSON: The argument would be that inasmuch as it is on a per-car basis, that anyone who is a retailer of cars should have that same benefit. And yet we don't have that benefit, even though we paid the amount which goes into that benefit.

THE COURT: This may raise issues of law which we can't deal with in conversation and discussion. Maybe we have to have some kind of memorandum on this. But frankly, just almost in the nature of things, I wouldn't think that General Motors -- dealers are permitted to advertise, aren't they?

MR. PERSON: Yes, they are.

THE COURT: And they can advertise for their own benefit, they don't have to advertise for Nabcor; is that right?

MR. PERSON: That is correct.

THE COURT: All right. General Motors franchises certain dealers. Is that right?

MR. PERSON: That is correct.

THE COURT: Is it illegal for there to be dealers' associations or organizations who jointly advertise for the benefit of the dealers?

MR. PERSON: It is not a voluntary arrangement among the dealers. That is, that this is mandated on the dealer. It is a requirement that the money be subtracted from the dealer's payment to the manufacturer and then paid over to that organization. The dealer has no choice.

THE COURT: Is there any way we can approach this problem looking at it this way., and I will address Mr. Rosdeitcher.

What can we do to narrow the issues on this?

MR. ROSDEITCHER: Your Honor, I think in two ways. Let's take it just the way Mr. Person described it. As he describes it, the dealer pays his own money. G.M. isn't furnishing the dealer with any advertising services. The dealer is taking his own money and paying for an ad which is put out by a dealer association. As Mr. Person describes it, all that G.M. is doing is acting as the collection agent, collecting money from the dealer's pocket --

THE COURT: But that would be an issue of fact, wouldn't it? Mr. Person says that this is a procedure that is initiated by G.M., required by G.M., and that they sort of organized this thing. Now, that would be an issue of fact. The real question of law is, is this something that is really forbidden by Robinson-Patman 2-E? On its face it seems to me you have got some of the language complied with. Robinson-Patman 2-E says that it shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale. Then going on, by contributing to the furnishing of any services not given to the other fellow.

So you start, let's assume that G.M. takes this contribution and contributes to the furnishing of advertising services to the dealers. You've got that little segment of the language presumably complied with.

MR. ROSDEITCHER: I wouldn't agree with that, your Honor, because I am taking Mr. Person's facts and just the way you described it now. G.M. did not contribute. This is just the opposite of a 2-E violation, because G.M. made the dealer pay for it. G.M. didn't contribute the service. It charged the dealer, according to Mr. Person's hypothetical, or claimed situation. It made the dealer pay. If anybody should complain, it should be the dealer, because Mr. Person is not a dealer, he is not being forced to pay this. If the dealer wants --

THE COURT: Well, aside from that, let's assume that might raise issues of fact. In other words, if G.M., one might say, if the facts showed it that this was in effect something that G.M. initiated, they got the money and then they transferred the money to a dealer association and so forth. Now, is there any other way to -- Let's assume for the moment that that raises issues of fact and we couldn't dispose of it on that ground as a matter of law. Now, is there any other legal --

MR. ROSDEITCHER: Yes, your Honor.

THE COURT: All right.

MR. ROSDEITCHER: There is. Before I leave that, I would just like to -- I am trying to avoid an issue of fact. I am trying to accept everything you have just said and focus on the word "contribution." In that situation, you had, say, ten dealers, and G.M. took $2, or two percent of the price, from each dealer and put it in a fund and then made an ad for everybody. G.M. is contributing nothing. Every dealer has to pay. That's exactly what is not covered, because the dealers, according to Mr. Person, are forced by G.M. to contribute to their own advertising fund.

THE COURT: Well, I am not --

MR. ROSDEITCHER: I am going to leave that aside.

THE COURT: At this point --

MR. ROSDEITCHER: I would like an opportunity eventually to brief that point, your Honor.

THE COURT: All right.

MR. ROSDEITCHER: Second point, your Honor asked if there is another legal handle to get at that issue, and that is the handle we have been arguing all along, and that is whether Nabcor is a customer of G.M. discriminated against within the meaning of Section 2-E, and that was a point which we briefed extensively and argued extensively in the past, that Nabcor does not deal with G.M., and that Nabcor deals only with the franchised dealers of G.M. And like anyone else, pays the franchised dealers --

THE COURT: What about that? This is the thing we went over, and you know, you have quoted me that Federal Trade

Commission regulation which indicated the possibility that if certain facts existed, there might be a cause of action. That is, if the manufacturer or the supplier knows that a resale will be made to a fellow like Nabcor. And secondly, if in fact the fellow like Nabcor is competing with the first purchaser in line, then both Nabcor and the first purchasers might be deemed to be purchasers, or customers, within the meaning of 2-E.

Now, the thing is, if you are trying to isolate that and you look at the Federal Trade Commission regulation, you've got two issues of fact which might have to get tried before you could finally decide. And that would be the knowledg of the supplier that the first purchaser would resell to Nabcor. And secondly whether Nabcor is really in competition with the first purchaser.

MR. ROSDEITCHER: Your Honor, I don't agree that the Federal Trade -- First of all, I think it is a question of law as to whether that Federal Trade Commission regulation itself is the law under Fred Meyer. Because the Supreme Court has disagreed with the Federal Trade Commission before in the application of Fred Meyer itself. Fred Meyer grew out of a Federal Trade Commission case, the Commission decided differently. Secondly, we had argued, and I think that the question is not for us whether the manufacturer had knowledge of what the retailer, retailer purchasing from another retailer bought, our argument is that whenever the Federal Trade Commission intended that, it was not a regulation, your Honor, and that is critical, that guide is a hypothetical, they had no facts before them, it was done, it was just issued ex cathedra without any facts --

THE COURT: I am not applying it. I am just applying it like you might apply to any authority, a law review writer who knows what he is talking about might make a suggestion as to the law which the Court might, you know, be interested in thinking about, and that's all. I'm not saying that it is binding or anything like that.

MR. ROSDEITCHER: I understand, your Honor. What I'm trying to say is that based upon the facts as given to us as to what Nabcor's business is and what they do and how they get their cars, that the Federal Trade Commission never intended to cover this situation under Fred Meyer. Because Nabcor, let's assume for a moment that we take the words of the Federal Trade Commission literally, that very regulation is preceded by the phrase that the purchasers, or the customers, must be on the same functional level. If you look at the preambulatory phrase before that little hypothetical, they talk about people on the same functional level.

Now, Nabocor is part of a system which is an intermediary between the retail consumer and the franchised dealers. It is not on the same functional level. The dealer is the supplier to Nabcor. Nabcor is on a level, a functional level, beneath the level of the dealer. Some sort of agent in between the consumer and the dealer. And in that respect it is not on the same functional level.

Secondly, assuming that the Federal Trade Commission had concern with the retailers in the context of the normal Robinson-Patman Act concern for a Mom and Pop retail grocer who are competing with a supermarket, it is inconceivable that Nabcor on the undisputed facts as to how it does its business as the top of a pyramid of agents passing on an order from an agent bearing no risk, merely getting a bill of sale which says that it bought, but at the same time being fully covered by the purchaser, receiving the money in advance, getting only a commission is not a retailer in the sense that anyone is ever considered a retailer who is entitled to equal treatment with a franchised dealer of G.M. I don't see how they are on the same functional level, your Honor.

THE COURT: What do you mean by functional level?

MR. ROSDEITCHER: The same functional level as in a distribution system there are various people who perform different functions and distribute in different ways. There is the wholesaler, then there is somebody who sells down to a retailer, and then there may be somebody who sells directly to the consumer and performs certain functions, and he goes out and gets the consumer, or there may be somebody in between who first goes to one person at one level of that distribution system and brings an order to him and acts as an intermediary. That's what Nabcor is doing by its own admission.

THE COURT: The thing is, this is why -- maybe this isn't the best form to do it, but it seems to me rather than to keep on at those arguments about whether, you know, Nabcor is a purchaser or isn't, it seems to me it would be helpful to analyze the kind of claim.

Now, let's assume for a minute -- well, let me backtrack. At least for purposes of pretrial, or summary judgment or whatever you want to call it, I think I have pretty well got to assume that Nabcor is a purchaser. And I know you strenuously object to that, but I am going to. Because I know the defendants emphasize immensely this concept of brokerage. But again, for this purpose of pretrial, it seems to me that one way to look at Nabcor despite the nomenclature of broker, is Nabcor is someone who is buying cheap from the dealers and reselling in competition with them.

Now, I don't want to rehash that, but I am going to assume that that is the case, or that there is a triable issue on that. Now, the way I would like to approach these things is on that assumption. But it seems to me there still is a

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lot of the Robinson-Patman Act material that should be cut out.

Now, we will assume for the moment that Nabcor, at least Nabcor and maybe two or three of the other plaintiffs, was, or were, trying to buy at close to wholesale prices from dealers and were trying to compete with them. And they were buying and reselling. Now, the question still arises as to whether it is a violation of the Robinson-Patman Act to do the things that are alleged.

And Mr. Person, I really, I didn't grant the summary judgment because I didn't -- because I wanted to explore the issue in court. But frankly, I can't see that the Robinson-Patman Act in and of itself prevents General Motors from getting a contribution from their dealers and taking those contributions and pooling them and giving them to an association so that ads can be run in the New York Times or on Channel 2 or whatever to benefit all the Chevrolet dealers in the New York area. And I can't see that General Motors is required to refrain from that because of the presence of Nabcor, or that they are required to somehow extend that benefit to Nabcor.

It doesn't make sense to me and it is not because Nabcor isn't a purchaser. I just can't see that as a matter of a business scheme it even makes any sense.

MR. PERSON: Your Honor, it would make sense not to

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put us into that. We are not asking to be a part of the advertising campaign, we are asking that the same monetary payment that is made to that combine and to the leasing companies be made to us. That's all.

THE COURT: Now wait. I think we are getting a lot of confusion. In other words, you are saying that -- well, what do you claim General Motors should have done, then?

MR. PERSON: That they should remit a check to Nabcor in the amount of $15 to $20 per car for --

THE COURT: Wait a minute. Nabcor was buying from the dealer, weren't they? You bought from the dealer.

MR. PERSON: Not in all cases. We had bought from the factory. Through Midtown Chevrolet --

THE COURT: Let's talk about the purchases --

MR. PERSON: We would buy typically from a dealer and a leasing company would buy from a dealer, and the leasing company would have a rebate --

THE COURT: I am going to come to the leasing company. I am talking about your claim vis-a-vis the franchised dealers. You are saying that General Motors, in order to avoid some kind of discrimination in favor of the dealer, and against Nabcor, is supposed to refund to Nabcor all of the contribution that is a part of the Nabcor price; is that right?

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MR. PERSON: Yes, your Honor.

THE COURT: Well, what is there in the Robinson-Patman Act that says that?

MR. PERSON: I think that 2-E would say that it is unlawful to furnish services to their dealers on this per-car basis which other people in competition with a dealer do not get. There is a benefit that is given to these dealers that is unwarranted, because we are retailers also, and our $25 goes to pay for their advertising for retail sales in competition with us.

THE COURT: But you are not saying that the intent of 2-E is to force the same advertising benefits to be given to the competitor, the competing customers, but you are not asking for that, you are asking for your money back and it doesn't seem to me you are even trying to apply 2-E.

MR. PERSON: Well, proportionately equal terms.

THE COURT: If you were trying to apply 2-E, you would demand that G.M. set up some kind of an advertising scheme that would benefit Nabcor and the dealers.

MR. PERSON: Your Honor, the scheme is a very simple scheme, and that is if we get the $25 ourselves, we'll know how to apply it, and that would be the proportionately equal terms which that section talks about.

THE COURT: I don't think that is the way it works.

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I mean, again, I just think --

MR. ROSDEITCHER: Your Honor, could I add just one single thing about 2-E?

THE COURT: Yes.

MR. ROSDEITCHER: 2-E has nothing to do with money.

THE COURT: That's right. That's really right. In other words, you haven't -- that's what the problem is, you have lumped these claims of discrimination together, you have lumped the statutes together, and it seems to me that when you get down and really analyze the whole business, I don't understand youradvocation of it. Now, I don't want to spend endless time on one claim in one count. This is a hard one, maybe, and some of the others may be easier. But you are really saying that the only remedy you would seek is to have some money paid to Nabcor; is that right?

MR. PERSON: We would be willing to be included in that dealer advertising, but that would be awkward and not necessarily desirable.

THE COURT: I mean you are not asking for that in your relief, are you?

MR. PERSON: No, we are looking for equal treatment. If we had an advertising program we would want that payment. See, the payment is a fictitious payment. The manufacturer gets paid for the car and goes ahead and allocates so much of its own money to that dealer group which advertises for the benefit of the dealer. That is a rebate, it is the purchaser's services, it has -- it is a "D" type, it is a discriminatory payment by a seller to a buyer for promotional services. These are a group of buyers and they are getting a promotional payment. I don't see why it doesn't fit into both D and E.

THE COURT: Well, even if it fitted into D, the thing is you are not -- well, I guess you might have a little harder problem. But let's just stick to E a minute. You are not trying to enjoin the advertising programs that are -- you are not -- made by these associations.

MR. PERSON: I think we have requested that in lieu of equal treatment.

THE COURT: You have requested it?

MR. PERSON: I believe so, your Honor.

THE COURT: Where?

THE PERSON: I believe in the prayer.

Apparently not, your Honor. I guess we haven't made a request.

THE COURT: All right. Now, look, I am going to dismiss the claim in Count 14 which alleges Section 2-E discrimination in favor of franchised dealers and against Nabcor and possibly the other plaintiffs. And the reason I'm going to do it is because the type of alleged benefit being conferred upon the dealer is not a kind of benefit that the plaintiffs are seeking for themselves as far as the complaint now stands. That is, the alleged benefit is the contribution of advertising services for the benefit of the franchised dealers, and in my view it would be entirely inappropriate to even conceive of General Motors or the other manufacturers providing like benefits to purchasers from those dealers, such as Nabcor, and Nabor and the other plaintiffs do not in fact seek to have such advertising services provided for them. That is the basis for dismissing, striking out the 2-E claim that I have just talked about.

Now, I don't want to cut you off as far as 2-D, but again, how do you fit 2-D into this?

MR. PERSON: Well, the plaintiff is contracting with various dealers to pool money so that that involves third parties other than the individual dealer with whom we are competing.

THE COURT: Well, 2-D forbids payments to be made to one customer for advertising or promotional services that aren't made to the other customer. Right?

MR. PERSON: For the benefit of the customer. Those key words, "for the benefit," meaning the third party.

THE COURT: Your claim is that by making the payment to the dealer association and making a payment for the benefit,

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General Motors and the other plaintiffs are making payments for the benefit of the dealers which they are not making for the benefit of Nabcor.

MR. PERSON: Yes, sir.

THE COURT: All right. How do you deal with that, Mr. Rosdeitcher?

MR. ROSDEITCHER: Your Honor, to start with, General Motors is not making payment because they are simply taxing the dealer.

THE COURT: Isn't that conceivably an issue of fact?

MR. ROSDEITCHER: According to Mr. Person, he adds, General Motors adds the money onto the dealer, takes it out of the dealer's hide and pays it over to someone else to do the advertising. That is not a promotional -- promotional allowance would be if General Motors on top of everything else took,out of its own pocket, money, and paid it over to a third party to do advertising. A standard third party advertising situation where General Motors might have a magazine or catalog --

THE COURT: Mr. Rosdeitcher, let's suppose that General Motors got -- let's suppose there was nothing called an advertising contribution, it was just the price of the car, and there wasn't any differentiation between advertising contribution and any other part of the purchase price. Then

General Motors decides to take part of that purchase price and contribute it to some dealer association for advertising for the benefit of the dealers in Westchester or the dealers in Greater New York, or however it is done. Now, that could be a 2-D violation, couldn't it? It could come within 2-D.

MR. ROSDEITCHER: Conceivably.

THE COURT: In other words, you have an issue of fact of whether General Motors was really making the payment or whether it was being made by the dealers for their own benefit.

MR. ROSDEITCHER: Your Honor, could I just go off on one slight digression?

THE COURT: All right.

MR. ROSDEITCHER: That is as to what the facts are, because I think this may be one of those counts where the facts are so simple and so easily demonstrable rather than go over and -- I think Mr. Person could zero-in on one thing. The way the system actuallyworks is as follows:

G.M. does not fix any advertising contribution. What happens is that G.M. acts as a collection agent. It says, if a dealer association in a local area wants to have a cooperative joint advertising program of some kind, then that association can ask General Motors to act as a collection agent. That association, with the consent of the member dealers, fixes a price, establishes an amount which is to be contributed as an advertising contribution. G. M. specifies that it will not take any advertising contribution from any dealer unless that dealer signs an authorization stating that he is willing to contribute to that fund.

On those facts, your Honor, I think there can clearly be no --

THE COURT: What are these associations?

MR. ROSDEITCHER: They are associations of automobile dealers in the local area.

THE COURT: Say General Motors dealers in an area?

MR. ROSDEITCHER: Yonkers, Brooklyn, or wherever, yes.

THE COURT: And are they -- do they have any purpose other than getting together to pool advertising?

MR. ROSDEITCHER: Your Honor, I think they operate as a trade association performing the normal functions of a trade association.

MR. KAPLAN: Excuse me, your Honor. I think Mr. Ordman could enlighten us.

MR. ORDMAN: My name is Ordman. I am a member of the firm of Putney, Twombly, Hall & Hirson. We are attorneys for three of the automobile defendants. They are not members of the association Mr. Kaplan is referring to, because I also represent the New York District Ford Dealers Advertising Association, which does operate just the way this gentleman told you. Each dealer signs an agreement authorizing the factory to add to each invoice for an automobile $20 or $30 for an advertising contribution, and that fund is then paid by Ford Motor Company over to the New York District Ford Dealers Advertising Association and is used for advertising as chosen by the dealer members.

THE COURT: So your position would be it is in fact a payment by the dealer?

MR. ORDMAN: No question about it, your Honor. No question about it.

THE COURT: Is it voluntary?

MR. ORDMAN: Well, it is voluntary, your Honor. I don't know if you could be a Ford dealer if you weren't willing to do it. As far as I know, yes, they all agree to it and they all want it.

THE COURT: It is part of the price?

MR. ORDMAN: The price the dealer gets would be exactly the same as the other dealer would get, except the shipping charges, if there were not this agreement to pay the additional --

THE COURT: Who decides what the amount should be?

MR. ORDMAN: The association does. They have changed it from time to time. It used to be $20, it is now $30.

THE COURT: It varies from different parts of the country?

MR. ORDMAN: As far as I know. I only represent this one association.

MR. ROSDEITCHER: May I add one thing to that, your Honor? There are areas where there are no dealer associations at all, and there are dealers who are in areas where dealers do not belong to the dealer associations. So that again Mr. Person is theorizing we have a situation where it varies greatly, because there are situations where the dealers simply are not members of dealer associations and this doesn't take place at all.

MR. PERSON: Your Honor, there was some litigation by a dealer claiming that this was an illegal arrangement. Apparently this dealer, I think it was a Ford dealer, if I am not mistaken, was not pleased with the fact that he was being required to contribute to this agency, and brought suit to try to have the arrangements upset. So that maybe if it is voluntary now, I don't know how long it has been voluntary.

MR. ROSDEITCHER: Your Honor, may I interpose on that? Because Mr. Person apparently did not say there was a judgment. I happen to have some familiarity with this and

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there were a number of cases and they always were decided in favor of the manufacturer.

MR. PERSON: Why was the dealer suing?

MR. ROSDEITCHER: But he lost. That's not the question.

MR. PERSON: He was complaining about the requirement of payment.

THE COURT: Well, you have raised factual matters, and it may be that 2-D claim would be best disposed of when we have the facts. It is hard to deal with these things in the abstract. I like the idea of having the facts. It is a lot easier to deal with it. I don't think this would be a thing that would be immensely difficult to establish the relevant facts, and we can do that in the pretrial.

Let's reserve for the moment on 2-D, the claim of discrimination in favor of the dealer,and we'll come back to that at a later time.

So let's go on now to Count 14. Now, the other phase of the alleged discrimination is discrimination in favor of the leasing companies. Now, here again, this is something that I really wonder if we have got more than a theory. What are these leasing companies that -- well, let's approach it this way. Is this a two-way claim? I would think it is a two-way claim and nothing else. It is purely money.

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MR. PERSON: Yes, your Honor.

THE COURT: You are claiming that the leasing companies got the money and Nabcor didn't. So let's limit that phase of Count 14 to 2-A. Let's explore whether there is a valid 2-A claim, a triable 2-A claim for discrimination between the leasing companies and Nabcor.

Now, who are these leasing companies that you are competing with?

MR. PERSON: There are various leasing companies, and we are seeking an identification of those leasing companies, but there are various leasing companies which advertise in the newspapers, and these companies have purchase arrangements under these certificates which we have seen previously, and our understanding is that they do receive the advertising allowance as a rebate either from the dealer or directly from the factory. It seems a simple issue of whether they get that rebate of not.

THE COURT: I have a memory at a prior hearing I asked you about who the leasing companies are that you claim you compete with. Don't you have to establish that? Don't you have to be specific?

MR. PERSON: Well, they are in the Times. I can go back and pick up the specific leasing companies advertising in various areas during the period in question. I think that

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right now I just clipped out ads the other day, but I can go back and pick up specific names. Hertz and Avis, we understand, have entered into long-term lease arrangements. I can name those two right now.

THE COURT: We all know Hertz and Avis exist.

MR. PERSON: Well, they are selling cars -- if they are leasing cars on a long-term rental, Kinney and others, that's the kind of marketing that we are talking about, the three-year lease arrangements which are substantially equivalent to a sale. These are names of companies which we understand are doing it and others are doing it. Mainline is another one, Mainline Fleets.

THE COURT: I could be wrong, but it seems to me in a situation like this --

MR. PERSON: Curry subsidiary, your Honor. Curry was a named defendant. It had a leasing subsidiary, so that he --

THE COURT: Look, Mr. Person, it seems to me, and I could certainly be wrong on this, but you represent in your papers on the summary judgment motion that Nabcor is in competition and was in competition with long-term leasing companies; is that right?

MR. PERSON: That is correct.

THE COURT: Now, for the sake of that motion at that time I accepted that as possibly raising a triable issue. But I want to probe that now because it seems to me the nature of Nabcor's business and operation is really so fundamentally different from that of Hertz and Avis that I just think you've got to do something more than just say that Nabcor was making sales, Hertz and Avis make the functional equivalent of sales, therefore there is a two-way violation.

It would seem to me you would have to make more of a factual showing and more of a specific showing of a competitive situation. I just don't think I could presume it.

Now, if this suit were by Hertz and they were claiming that they competed with Avis, I don't have a lot of trouble with that. But this suit by Nabcor claiming they compete with Hertz and Avis, it may be, but I think, you know, I don't presume it --

MR. PERSON: Well, the competition is in the advertising of these automobiles. Since people will read ads, buy a car on a long-term lease, or buy it from Nabcor, or buy it from the dealer, this is where the competition for customers occurs, and the identification of these competing businesses can be ascertained from the newspapers and by going back, or I've made requests here for discovery for the production of these documents to show what advertising has been taking place. And we know that there are --

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THE COURT: I am just not -- I asked you about --

MR. PERSON: The yellow pages --

THE COURT: Maybe I'm narrowing the issues too much, but it seems to me you've got to demonstrate in fact that you engaged in some specific competition with some specific long-term leasing companies.

MR. PERSON: Well, your Honor, the competition is for the customer and that competition becomes keen in the advertising.

THE COURT: Isn't it a matter of location --

MR. PERSON: Not necessarily. The brokers have been able to get customers from a variety of places, the same way as dealers are able to sell cars in a variety of places. It isn't just in the corner of their town. They do market within, I don't know, 15, 20, 30 miles.

THE COURT: Let me ask Mr. Rosdeitcher, maybe this is not going to be a fruitful area to pursue at the present time, but it seems to me, what is the law, what kind of a showing has to be made on this issue of competition?

MR. ROSDEITCHER: Your Honor, he has to show that one of his three plaintiffs were in actual competition, in a real economic sense, with somebody --

THE COURT: He says Nabcor -- I guess he would say -- Where is Nabcor East located?

MR. PERSON: That was in Yonkers, your Honor.

THE COURT: All right. Nabcor East is in Yonkers and Hertz and Avis are in Yonkers, therefore they must be in competition because they are both out to market cars in one way or another.

Does he have to show anything more than that?

MR. ROSDEITCHER: Yes. He has to do more than that here, your Honor, because he started off on an assumption which your Honor accepted for the purpose of summary judgment that these long-term leases are in competition in reality with sales, with dealers, and with Nabcor, with what Nabcor was doing. He has never attempted to demonstrate that other than by vague phrasing, functional equivalents, these leases are functional equivalents of sales.

Now, your Honor, he should know this, because Mr. Maiorana was in the leasing business. He should have been able to tell us how this so-called functionally equivalent lease operated, what made it equivalent, what made it competitive with a sale. There was not -- there has not been a word on that.

The second thing, your Honor, is that I would like to bring up the question of discovery here because this illustrates the kind of unnecessary, unfair burdens we are being put to. He says that Nabcor is in Yonkers, he has asked for documents relating to our entire fleet sales all over the United States and everywhere in the world. He just doesn't know how to limit himself. Three years ago we asked him to tell us which are the leasing companies with whom he competes with respect to G.M. cars. The answer to that interrogatory, I think it was three years ago, was everybody within a 50-mile radius.

THE COURT: Well, I mean that could be.

MR. ROSDEITCHER: First of all, G.M. doesn't sell -- to the extent that there is a leasing company to whom G.M. does not sell a car, obviously there is no claim as to that particular leasing company.

THE COURT: Well, let's just take automobile dealers. Now, if a dealer in a -- if a Chevrolet dealer in Yonkers was suing General Motors claiming that there was discrimination in favor of other Chevrolet dealers, what would he have to show -- does he have to show that customers came to each one and inquired about prices? Does he have to show specific instances where he was fighting with another dealer to make a specific sale? That isn't what you have to show in competition, is it?

MR. ROSDEITCHER: Your Honor, he might be able to prove that inferentially from broader economic facts. He might put on an economist to study this market, who says an average shopper travels 25 miles to go to a different retail store. There might be surveys to do that. He has the burden to do all of that. I can't tell him how to prove his case. One way is to bring in a consumer who says that I shopped. Another way is to bring in an Arthur D. Little who says, we made a study and it shows a consumer travels so many miles. It is very diminuous when a consumer will travel beyond that point. Those are the things that he has the burden of doing.

THE COURT: Well, how do you approach the competitio issue for Nabcor? Because Nabcor was, at least under my assumption, was reselling to the customers of these brokers. And Nabcor is sort of a pivot of this whole thing. How do you approach the competition issue on Nabcor? Nabcor had dealers scattered throughout the eastern part of the United States.

MR. ROSDEITCHER: Your Honor, I hate to say this because I know you wanted me to -- it seems to me that indicates why Nabcor is not a purchaser. Nabcor is just supplyin automobiles to these purchasing agents and this is one big purchasing agent business. That is one answer to it.

The second answer is, if you are going to take these purchasing agents, you are going to bring back through the back door claims which shouldn't be in this case. That is, claims about discrimination against purchasing agents. Becaus it wasn't Nabcor that was selling the cars to these customers, it was the purchasing agent who was acting as an agent and getting its cars through Nabcor by transmitting the order up. And Nabcor merely took a $50 commission on each sale. So I think one of the problems here is that we are dealing with a highly unrealistic hypothesis here. That is, that Nabcor was a purchaser while all its franchisees were agents. In fact, it is just one big agency system, and that's why we are getting into this kind of difficulty.

THE COURT: How do you approach the competition issue on Nabcor?

MR. PERSON: Well, first of all, Nabcor started off --

THE COURT: You said Nabcor would be in competition with all the leasing companies in the geographical areas of all of the franchisees?

MR. PERSON: We overlap in the advertising. That's where the real competition takes place.

THE COURT: I don't understand the overlapping --

THE PERSON: The competition is keenest in the advertising for customers. This is in the newspapers where leasing companies, dealers and brokers advertise. This is how they get the customers --

THE COURT: Well, so you would approach it by showing ads by Nabcor?

MR. PERSON: Yes, right.

THE COURT: Wait a minute. I am talking about Nabcor not the franchised dealers.

MR. PERSON: Yes. Nabcor started out selling and it had to expand and get other people to do that subsequently, but it did start off by doing most of the sales and deliveries itself, from what I can recall. It wasn't always doing every car, but many cars it did deliver itself.

THE COURT: All right. But the concept of Nabcor which you have, you know, you are asserting in this action, the basic concept is that Nabcor is to buy cars from the dealers and resell them to the purchasers, the ultimate consumers who have given these powers of attorney to the broke But the point is that Nabcor is the central purchasing entity and it sells, or transfers, the cars, distributes the cars out in the field.

MR. PERSON: It is a dealer and either sells directly to a customer or in later years, because of the problems, it transferred most of the function of selling to customers over to brokers. But at the outset --

THE COURT: But on the issue of competition, who is doing the competing with --

MR. PERSON: Nabcor at the outset, definitely.

THE COURT: Let's take a dealership out, there was somebody in -- well, let's just take a hypothetical, Harrisburg, Pennsylvania. Let's assume you have a dealer out there. Now, if we are talking about competition with a leasing company, then you would have to be talking about competition with a leasing company in Harrisburg or near Harrisburg, wouldn't you?

MR. PERSON: That would be one area of competition, yes.

THE COURT: Well, let's start with that area.

MR. PERSON: Yes, your Honor.

THE COURT: In other words, you are talking about competition in the retail selling or its equivalent of cars; is that right?

MR. PERSON: Yes, but Nabcor is competing because Nabcor is the dealer making that sale. If Hertz has agents throughout --

THE COURT: Which is making it? Is it the local?

MR. PERSON: No, he doesn't get title; he only generates an order. So we have a variety of people generating orders and the dealer, either Turco, Nabcor or Strimple would be the selling dealer.

THE COURT: So you are saying that Nabcor -- in other words, Hertz has its offices throughout, and you would consider the competition that Hertz engages in and that would be Hertz business all over; is that what you are saying?

MR. PERSON: That is correct.

THE COURT: And so you would apply the same theory to Nabcor and say that Nabcor is competing wherever its brokers are competing?

MR. PERSON: To the extent that the broker would order from Nabcor. If the broker orders from another dealer other than Nabcor, then the competition is less apparent. It is not as strong a case. But the dealer is the one that obtains the car and transfers the title directly to the customer; he would be the person that's doing the competing.

THE COURT: Wait --

MR. PERSON: The Nabcor dealer, such as Nabcor Turco or Strimple, the one ordering the car, taking title and transferring it to the customer, would be the Nabcor entity.

THE COURT: Well, let's take Giamelli or Young.

MR. PERSON: They would be generating orders.

THE COURT: Who would be doing the competing?

MR. PERSON: They are generating orders for us as the dealer. They are not purchasers, I think you held that, your Honor, that Giamelli and the others are not purchasers so that the purchaser becomes the competitor, and that is us. That is Nabcor.

THE COURT: Well, I don't know that we are getting anywhere this way.

MR. ROSDEITCHER: I wonder if I could take another approach on this, your Honor. There are two things, obviously. First of all, on that narrow factual issue which we talked about earlier on the 2-D count, I think we could come forward with enough simple facts which would greatly limit what G.M. is doing with this advertising contribution.

THE COURT: All right.

MR. ROSDEITCHER: The second thing, your Honor, is that now we are talking about 2-A, and I hope that we are now free of the shackles of that FTC guide, because if we look at this transaction, accept Mr. Person's description of the transaction that G.M. somehow --

THE COURT: The FTC guide doesn't even apply. We are not talking about the same issue.

MR. ROSDEITCHER: Exactly.

THE COURT: We are talking about the issue of discrimination vis-a-vis the leasing companies.

MR. ROSDEITCHER: On price. Hence the FTC guides are not applicable and we have a situation which on one hand Mr. Person says we give -- we reach over as you described it, and gave a rebate to a fleet. Under Section 2-A we still have not established that Nabcor is the purchaser because the words of the statute are that the supplier --

THE COURT: Really, let's not reargue that. I think we will pass the 2-A claim. I would like to somehow -- it seems to me on the 2-A claim discrimination in favor of the leasing company and against Nabcor and the other two or three that the thing I think we've got to button down is the -- maybe there are other things, but the question of competition, I don't think we can approach it fully in this conference. But there is a claim that there is this competition. But there ought to be a way to get a handle on that and see whether that is a triable issue or not, and not have vast discovery.

But let's defer on that. Now, I think that's all we can do on Count 14. I think some of the others are easier.

Count 15, as I understand it, is a claim that the manufacturer set up subsidiaries which made available to franchise dealers certain financing services, insurance services and then paid the dealers commissions or rebates if they gave the subsidiary some business. So the dealers allegedly were benefited by having financing and insurance available and also by getting some commissions.

Now, this is a claim of discrimination only vis-a-vis the franchised dealers, is it not, Mr. Person?

MR. PERSON: Yes.

THE COURT: It doesn't involve the leasing companies?

MR. PERSON: Yes, your Honor.

THE COURT: So it is only a claim of discrimination against Nabcor and other plaintiffs in favor of franchised dealers. Is that right?

MR. PERSON: Yes, your Honor.

THE COURT: All right. Now, what section of the statute is it under?

MR. PERSON: It is a rebate of a payment to the dealer and it would be a price --

THE COURT: So you claim it is a 2-A.

MR. PERSON: Yes.

THE COURT: Do you claim any other section applies?

MR. PERSON: Possibly D by a contract with G.M.A.C. between the manufacturer, that is between the manufacturer and its subsidiary, unless --

THE COURT: Well, what payment does G.M. make to G.M.A.C. for the benefit of the dealer?

MR. PERSON: Not to G.M.A.C., but payment is made to the dealer.

THE COURT: Wait a minute. How do you fit -- how would you fit this within 2-D?

MR. PERSON: Well, 2-D would be the factory would have its subsidiary make a payment to the dealer so that it would contract for the payment of anything of value. You see, the factories control these --

THE COURT: All right, you are talking about this commission or rebate; is that right?

MR. PERSON: That's right.

THE COURT: But how does that fall within 2-D? Is it being paid to the dealer so that they can provide services?

MR. PERSON: It is with respect to the sale of a car which they finance or obtain insurance through G.M.A.C., they obtain a payment from G.M.A.C. And that would be a 2-D situation where the factory has contracted with G.M.A.C. and the other finance subsidiaries to make that payment to the dealers.

THE COURT: Well, let's assume -- you don't claim a 2-E problem?

MR. PERSON: No. Well, yes. Because it is the -- In other words, the insurance and --

THE COURT: A service?

MR. PERSON: It is a service, right.

THE COURT: So you claim it would fall under all three sections?

MR. PERSON: Right.

THE COURT: Now, what I don't understand is what is there really that obligates General Motors to make that kind of a -- Let me put it this way: What do you claim should be done? Do you claim that General Motors is required to make this same kind of an arrangement with Nabcor, or with Nabcor East or General Auto Sales?

MR. PERSON: It is either a rebate or service or payment contracted for which because of our inability to get that --

THE COURT: Wait a minute. Wait a minute. Do you claim that --

MR. PERSON: It is illegal and discriminatory, the fact that we can't have that once we do obtain --

THE COURT: That is your conclusion?

MR. PERSON: Yes.

THE COURT: But I just want to approach it -- maybe I'm not making myself clear.

MR. PERSON: No, I'm just trying to set the issue.

THE COURT: Do you claim that G.M.A.C. should make the same kind of arrangement with Nabcor that it makes with, say a Chevrolet dealer, that is, go to Nabcor and say, look, Nabcor, if you are involved in a Chevrolet, you can get financing for your customer through me and G.M.A.C. will give Nabcor a rebate or commission? You claim that that whole set of business arrangements should be made with Nabcor?

MR. PERSON: Yes, because we --

THE COURT: Have you ever applied for it?

MR. PERSON: Yes, we have, your Honor.

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THE COURT: You have?

MR. PERSON: Yes, sir.

THE COURT: To whom?

MR. PERSON: To G.M.A.C. And we claim that since it is controlled by General Motors, that G.M. has the obligation of making available --

THE COURT: I won't get into that.

THE PERSON: It is a subsidiary of G.M.

THE COURT: I won't get into that. I find it very hard to believe that the Robinson-Patman Act would require G.M A.C., or General Motors through G.M.A.C., to set up this kind of a business relationship with Nabcor. I would assume that if there is anything that G.M.A.C. has a choice on, it is whether they want to get into a business commission arrangement Now, aside from the arguments about purchaser or purchaser fro this just strikes me as almost an impossible argument from a business and legal basis.

MR. PERSON: Once again we have the problem of a -- this is a manufacturer which has a subsidiary set up to assist one set of retailers of automobiles and we claim that we need that type of activitiy ourselves, or proportional benefit somehow.

THE COURT: You your whole theory is that you don't -- I don't even know how it would work under your theory

Your theory really is that your people are low overhead and that they can operate from their homes. Now, the kind of financing, insurance business that you are talking about I would think would involve a little more business. Maybe I'm wrong.

MR. PERSON: It is the customer who is getting the financing.

THE COURT: How does this thing work? I imagine the facts are hotly contested, but I don't know. How does the financing and the insurance work?

MR. ROSDEITCHER: Your Honor, I don't think there is much dispute on that. G.M.A.C. gives, will give financing and insurance to customers of franchised dealers who buy new cars.

THE COURT: This is not -- you are not saying this is in the -- the financing isn't in the financing of the dealer's purchases from G.M.?

MR. PERSON: No.

THE COURT: It is strictly a financing for the customer of the dealer?

MR. PERSON: That's right.

THE COURT: And the same with insurance?

MR. PERSON: Yes, sir.

MR. ROSDEITCHER: The customer could go to G.M.A.C. or anybody, it goes to G.M.A.C. and they give credit. Indeed, the fact is G.M.A.C. will give credit as I understand it to a new car buyer from Nabcor.

THE COURT: But he is saying that the Nabcor can't get some kind of a commission. Does G.M.A.C. pay a commission to the dealer on insurance and financing business?

MR. ROSDEITCHER: Yes, your Honor, the dealer does get that commission for his selling services of directing the business and arranging the transaction with G.M.A.C. But, your Honor, I think you have hit upon something. Your discomfort about the idea of saying the Robinson-Patman Act would require G.M.A.C. to enter into a commission relationship with Mr. Person's client is right on the beam. These are separate businesses. There is a business that G.M.A.C. has of selling credit and there is a business of selling insurance, and the franchised dealers are acting as agents for G.M.A.C. in those transactions or commission brokers arranging these transaction

Now, if you take the act you will see that this transaction, the financing, insurance has nothing to do with the Robinson-Patman Act. We are talking now starting with 2-A your Honor, we are talking about the price on the sale of cars to dealers and to Nabcor, and you have to look at the original sale of the car and I think Mr. Person concedes that finance and insurance has nothing to do with the price of the car to the dealer. If he doesn't, he ought to.

THE COURT: He is saying that, as I understand it,

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this is a matter that comes in when the customer buys from the dealer. That's the point we are talking about.

MR. ROSDEITCHER: That's right, your Honor. And if the customer -- but it has nothing to do with the price of the car that G.M. sells to the customer -- I'm sorry, it has nothing to do with the price of the car that G.M. sells to the dealer.

THE COURT: He says it really does. He says that by making the allowance, or commission or whatever you call it for the business referred to G.M.A.C., that that is in effect a price reduction and benefit to the dealer. Because they get a few dollars commission for this insurance. That's one of your arguments; is that right?

MR. PERSON: Yes, your Honor. It is all part of the sale. It is conditioned. The sale isn't made first and the fellow gets financing. The financing is there at that moment the sale is made. It is a packaged deal with G.M., done through the subsidiary and it is a subsidiary sale.

THE COURT: But Mr. Rosdeitcher's point, it isn't part of the sale to the dealer. G.M. sells cars to the dealer, then I mean that is one transaction, the dealer sells the car to the ultimate buyer. At that point you've got a purchase price -- wait a minute. The buyer pays the dealer something, the dealer -- the buyer needs financing --

MR. PERSON: Your Honor --

THE COURT: Wait a minute. The buyer needs financin and at that point financing is arranged through G.M.A.C. and the dealer gets a little commission. So what Mr. Rosdeitcher points out is, if I understand it, that this commission that we are talking about is really part and parcel and the result of the second sale, that is, the sale by the dealer to the buyer. Why isn't that true?

MR. PERSON: Because I think that perhaps 20 percent of the sales made by a dealer come out of the inventory, existing inventory in the shop of a dealer. The other 80 percent are in cars that are not in existence yet and the purchase order has to be placed with the factory. So that the ordering and the financing are at the same time.

THE COURT: Have you applied to anybody but G.M.A.C. for the privilege of engaging in this kind of insurance and financing and brokerage business and getting the commissions?

MR. PERSON: I believe we have, but I would rather go back and find out specifically. I think that we did, thoug I have named the companies here, but I am unsure right now. I think we did, but I can find out quickly.

THE COURT: All right.

MR. ROSDEITCHER: Your Honor, rather than belabor the point, I would like to put in a brief memo on this. As I understand it, Mr. Person is not claiming that what the dealer is doing is performing some sort of sham service for which he is not really being paid, he is just being paid some kind of under-the-table rebate. What he is saying is that he, too, would like to perform that service. Now, what he wants to do is have us set him up in a separate business, that is, the business of referring people to G.M.A.C. for credit and for insurance.

THE COURT: Well, let's --

MR. ROSDEITCHER: I can establish that --

MR. PERSON: If it is a separate business, then why wouldn't they want the customers we would refer? They said they would take it, but we don't get a commission.

THE COURT: What is there in the Robinson-Patman Act that says they have got to give you a commission?

MR. PERSON: Well, if they are giving it to people we are competing with, we would want that same commission for equal services performed in the sale of that car.

MR. ROSDEITCHER: We would also have to appoint Mr. Person our commission agent which we don't have to do, and the Robinson-Patman Act doesn't require that.

THE COURT: This really, it seems to me, is part and parcel of the whole franchise dealer system. Now, if G.M. has the right to have franchised dealers, they have to have business relationships with G.M. which other people cannot

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demand.

MR. PERSON: But the banks are there. The other C.I.T. financial --

THE COURT: That is beside the point. I am saying it seems to me that there are certain prerequisites. Inevitable prerequisites, not inevitable, but certainly prerequisites of being a G.M. franchised dealer, and there are certain things that are illegal but certain things are probably proper. And I don't know of anybody who has ever contended that it was improper to, you know, all other things being equal, to have G.M.A.C. which provides financing and to have the dealers be able to refer the customers to G.M.A.C. and get a commission for that referral. I don't think you contend that that is wrong. You just contend that Nabcor should be able to do the same thing. Is that right?

MR. PERSON: It is not --

THE COURT: Well, wait a minute. Isn't that right basically?

MR. PERSON: We have wanted that same service that is offered to the dealers.

THE COURT: Do you want to be able to refer auto financing and insurance to G.M.A.C. and get a commission for doing so? Is that right?

MR. PERSON: That is correct.

THE COURT: All right. Then it seems to me that that is in essence a kind of a brokerage business and I don't know anything in the Robinson-Patman Act that requires G.M.A.C. to appoint Nabcor its broker.

MR. PERSON: G.M.A.C. is not the franchisor, G.M. is the franchisor and they have contracted with a separate company to have a benefit for their dealers that makes us less able to compete. And that is a service, or price discrimination.

THE COURT: All right. Well, it seems to me that I will reserve on Count 15, but it seems to me it is a pretty unlikely possibility, but I won't finally decide it.

Now, Count 16, I am completely baffled by. You claim that Nabcor -- well, let's start with the same format. What is your claim of discrimination? I mean, who is discriminated against and in favor of?

MR. PERSON: The discrimination is that the dealer and the leasing company, long-term leasing company, has a warranty program which we as dealers in competition with them are not able to enjoy.

THE COURT: So you are claiming discrimination against Nabcor and other plaintiffs in favor of franchised dealers; is that right?

MR. PERSON: And long-term leasing companies.

THE COURT: And long-term leasing companies. And you are claiming that the warranty program, that is the ability to make warranty repairs and get paid for it, is made available to the franchised dealers and the leasing companies but not to Nabcor?

MR. PERSON: That's right, and to buy parts at lower costs.

THE COURT: So you can do the work?

MR. PERSON: Right.

THE COURT: And you can buy the parts at lower prices and get paid for the labor; is that right?

MR. PERSON: Right.

THE COURT: All right.

Now, just refresh my memory, was Count 16 and the other Robinson-Patman Acts, were these counts originally brought on behalf of other classes besides the Nabcor brokers?

MR. PERSON: I don't believe so. I believe it would only have been the Nabcor brokers. Possibly other brokers if they had been included, but it is a Nabcor --

THE COURT: But this wouldn't have been on behalf of groups of franchised dealers or anything?

MR. PERSON: No, nor leasing companies.

THE COURT: Now, how do you justify Count 16 when one of the premises even stated in the complaint itself is that Nabcor dealers never intended to have the overhead and capital expenditure involved in setting up repair services?

MR. PERSON: Your Honor, I wanted to get this straight because I think you have been going off. It is a crucial thing to remember, and that is that we have the intention of having contractors do the work. That is, independent shops which are available in every town to do the work on a sublet basis, the same way that many dealers in fact sublet their work.

THE COURT: Did you ever ask for this?

MR. PERSON: Yes.

THE COURT: Who did you ask for it?

MR. PERSON: I would have to go back and ask the details of that. We have in fact --

THE COURT: Look, if you subcontract, I guess you are saying you could save the overhead and the capital costs because the guy who would have to swallow that cost is the garage to whom you subcontract.

MR. PERSON: We also made a complaint to the FTC, copies of which I think were supplied, and maybe to the Justice Department about the warranty. We have a lot of --

THE COURT: Did they ever act on those complaints?

MR. PERSON: No, that's not too likely.

THE COURT: All right. Now, did you ever approach anybody about subcontracting?

MR. PERSON: Yes, and I don't have the details right now, but we did. Yes. In fact, we have subcontracted a minimal amount of work for which we, as I recall, did not get the compensation. We have had to ask the dealer, we have had to insure that the customer is satisfied even at our own expense. So that makes it difficult. Now, if we don't enjoy that warranty right because the customer comes back to us and we have had to effect repairs through --

THE COURT: You've got to subcontract --

MR. PERSON: We only want to break even, but it is a service to the customer. Maybe break even, but we have to pick up the cost, as it is, to provide the same services.

THE COURT: Look, Mr. Person, just as a matter of -- I couldn't see how you could make any money off this.

MR. PERSON: We are in the business of selling cars and if you cannot --

THE COURT: So you don't claim you would have made a profit off this?

MR. PERSON: Possibly, but I don't know. It couldn't have been that much. It could not have been that much. It would not have been a major --

THE COURT: No appreciable profit from this subcontract.

MR. PERSON: That's true. I don't look upon it as a major source of income, necessarily. I look upon it as a service given to others, a rebate or a payment of service given to others which makes them more competitive in the marketing of cars, because we don't have that --

THE COURT: Let's get the claim. You are not claiming it as a lost source of profit as such, you are claiming it as a competitive disadvantage in the sale of cars; isn't that right?

MR. PERSON: Which costs us either money to perform the services for which we get no reimbursement or makes us less able to sell cars because of that. So that we would want that same program granted to our competitors.

THE COURT: Well, what is the answer to that?

MR. ROSDEITCHER: Your Honor, I think this is the same problem that we have with the financing and insurance. G.M. gives warranties which run to the customer from the franchised dealers. They run to the customers from Nabcor. Mr. Maiorana testified that he had some problems occasionally but that generally the work was done by G.M. franchised dealers for a customer who bought from Nabcor. We, G.M., are paying our franchised dealers for performing repair work. The complaint as alleged says that in fact we probably are underpaying our poor dealers for that repair work. And there is no reason and there is nothing in the Robinson-Patman Act which says that not only must G.M. appoint Nabcor, Nabcor doesn't want anything to do with repairs, we have got to appoint subcontractors that Nabcor picks to carry out the warranty repair program --

THE COURT: This is a warranty of G.M., is it not?

MR. ROSDEITCHER: That's right, it is a warranty of G.M. and G.M. has to pay for it and now we are told that the Robinson-Patman Act says that in contracting for services to fullfil that warranty, we are limited in our choice, we can't choose our franchised dealers to perform that warranty service, we have to choose -- we can't even choose Nabcor, we have to choose whoever Nabcor chooses to subcontract the work.

Your Honor, this is a separate service, it is a separate transaction. It comes not at the time of the sale of the car, it comes not at the time of the resale of the car, it comes much later, and indeed the dealer, the allegedly favored dealers, do not necessarily and indeed I understand that in a majority of the cases do not end up repairing and performing services on cars that they sold. And frequently will end up repairing cars which Nabcor's brokerage system sold based on the warranty that runs to G.M.

THE COURT: Well, this is just impossible. I am going to dismiss Count 16. I see nothing in the Robinson-Patman Act or any authorities under it which would require

General Motors or any other auto manufacturer to appoint Nabcor --

MR. PERSON: Your Honor, no one has --

THE COURT: -- to use their warranty programs to do the repair work under the manufacturer's warranty or to pay Nabcor for doing that warranty work or to supply Nabcor parts at reduced prices.

MR. PERSON: Your Honor, may I state --

THE COURT: To me this is --

MR. PERSON: Your Honor, no one talks about --

THE COURT: -- completely outside the realm of Robinson-Patman.

MR. PERSON: We are not talking about -- we are talking about payments. G.M. makes payments to leasing companies and the leasing company performs that work. There is no payment of any kind, it is strictly a payment, and we want it.

MR. ROSDEITCHER: It is a payment for his service, Mr. Person.

THE COURT: Really, I think that under the allegations on the face of the complaint, it involves services performed by the dealers for which those dealers are responsible. That is your allegation. And so I am dismissing Count 16 on its face.

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All right. Let's go on. 17 is really a hybrid of some other counts, I think. If I understand 17, the claim is that purchasers of 10 or more cars each year are granted fleet certificate numbers entitling them to buy cars at dealers and have certain advantages. The claim is that these fleet buyers get special prices, they get a rebate of the advertising contribution. They have available to them financing and insurance and they get the warranty program. Now, we are talking here about the long-term leasing. That is the claim of discrimination, is it not?

MR. PERSON: Yes, your Honor.

THE COURT: All right. Now, insofar as the Count 17 alleges discrimination in failure to provide Nabcor with the warranty program, that claim is dismissed for the reasons I just mentioned with respect to Count 16. With respect to the claim as to the advertising contribution, we will hold that in abeyance. We are discussing that further in connection with Count 14.

As to the -- I don't quite understand, what is it you claim as far as financing and insurance? What financing and insurance benefits are made to the leasing companies?

MR. PERSON: I believe that they would be able to buy at a reduced rate, that they would have a rebate built into the price that they would pay.

THE COURT: This is something you were talking about in connection with Count 15, isn't it? Because Count 15 is speaking of the --

MR. PERSON: It would be the other side of the coin. That is, it would be the leasing company's benefit when it is the purchaser, so it would have a reduced rate.

MR. ROSDEITCHER: Your Honor, that claim has never, never, in three years' service in this case, never was there any suggestion about --

THE COURT: Well, wait a minute. Count 15 was strictly a claim of discrimination in favor of the dealers; am I right?

MR. PERSON: In favor of the -- 15 would be in favor of the dealers.

THE COURT: All right. Now we've got a little different thing in Count 17, and you claim that, one of your claims in Count 17 is that the leasing companies who have got the fleet certificates had certain benefits in the way of financing and insurance, and again what --

MR. PERSON: It would be in the form of a reduction in the price in comparison to what the customers of the dealer would pay.

THE COURT: Well, you don't say it here. I am looking at Paragraph 162-D, you simply say, availability of

THE COURT: It seems to me that none of what you are saying comes within 2-A or Robinson-Patman. I think it is so obvious I am going to dismiss that. Count 25 is dismisse

26, isn't 26 about the same?

MR. PERSON: It is a combination of 24 and 25.

THE COURT: In other words, it is a claim of -- this is a claim of price discrimination in favor of dealers who are fleet purchasers; is that right?

MR. PERSON: Yes, sir.

THE COURT: All right. It seems to me that both 25 and -- I cannot see how you can have a Robinson-Patman 2-A price discrimination claim where the allegation is that certain price arrangements were made with the franchised dealers and the same price arrangements were not made with Nabcor or other plaintiffs who bought from those dealers. Thos claims cannot be made under the Robinson-Patman Act Section 2- and Counts 25 and 26 are dismissed.

I think that is as far as we can go this afternoon. If we could look over the record and see what questions are still reserved for further briefing, I would appreciate your not firing off briefs until we look at the record and decide what still has to be done. We have made a little progress this afternoon.

Now, on discovery, if we could just take a few minutes and talk about discovery. Have the defendants had a chance to look at the memorandum?

MR. ROSDEITCHER: Your Honor, extremely briefly. We got it late yesterday afternoon by sending our own messenger to pick it up from Mr. Person, and then distributed it to every one of the co-defendants late in the afternoon. We have a general statement to make about it if you would like to hear it at this time. We also have specific objections to each of the 74 categories of documents. But I think that we could benefit from, I think, additional time to crystalize our objections, but there are some objections that are clear on the face. There are some items in here which would require us months to gather. It would require Mr. Person years to inspect, and I don't think he realistically believes that he is going to look at these documents. There is one in there, your Honor, which asks for the production records by days -- here it is, complete and actual production of each new-car plant of each of the plaintiffs by days or weeks. Now, what that has to do with anything in this lawsuit is beyond me. And this is typical of many of the kinds of claims that are in here.

There are requests in here for materials relating to franchisees who are out because the class was dismissed, there are broad claims of just the broadest nature, we have a list here somewhere.

THE COURT: The thing that discourages me, Mr. Person, I am just flabbergasted with this proposal and I don't think anybody, including you, wants to spend the next decade on this case. And I don't think it is necessary.

Now, it seems to me, heaven knows I don't want to be attorney for the plaintiffs and I don't want to decide what discovery to demand, but this is so far out that I think we are going to have -- I don't see any point in even having defendants -- I suppose that if they brief their objections we could have a hundred pages of brief on the objections.

The whole thing. We are not starting out right. It seems to me, and I haven't really thought it through, that there is a starting place, a logical starting place for the plaintiffs' discovery, and it is not so grandiose. I would assume that the plaintiffs would be entitled to have discovery from defendant auto manufacturers of whatever documents or files they have that pertain to Nabcor. There are a few things that you can start out with that are pretty obvious. It may be that you would be entitled to just take the dealers that had been referred to in the depositions of these plaintiffs as being involved in claims of refusals to deal, an get maybe -- maybe take depositions of those people, get discovery of documents from them, of documents pertaining to

Nabcor, transactions with Nabcor. And if there are, say, newspapers that are alleged to have denied advertising to certain of the plaintiffs and there are defendants in the action, it seems to me you would be entitled to get discovery of the documents pertaining to Nabcor. I mean that seems to me the kind of a starting place to see where we are.

Now, maybe you would get a memo from Ford or General Motors about Nabcor from someone to someone. That might reveal a witness for a deposition. But I would think we want to stick to the case and not get into a --

MR. PERSON: Your Honor, may I say one thing that is very important here?

THE COURT: Yes.

MR. PERSON: I do want to make an attempt to prove monopolizing to the jury and as a result I need a lot of these things which you feel maybe is not directly related to Nabcor's claim, but we do feel there have been -- there is an enormous amount of monopolizing and that we do need certain things to make that -- to offer that to the jury.

THE COURT: Well, that is a stage a little ways down the game. I am just not going to permit a discovery which in the end may turn out to be completely useless because some basic initial prerequisites aren't proved.

Now, I know the rules of discovery as well as you do,

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I think, and I know about the bread of discovery and all that. But also the discovery has to be sensibly organized and there are limits.

Now, I feel that in the long run it would be good and desirable to take this discovery in bites, and I think your memo makes me absolutely determined to organize this discovery, and I have no intention of depriving you of what you are entitled to, and I have no intention or desire in the world of protecting General Motors or these other defendants from producing what they should produce. And I want to get to the merits and I think that will be the quickest way to get this case over with. But it seems to me the way to get to the merits is to stick to the central issues at the beginning, and that is Nabcor.

Now, what communications, plans, plots, whatever you call them, if any, did they have about Nabcor? We get the discovery on that, and that is a pretty good start.

MR. PERSON: Right. I agree with your Honor. I was only acting under the assumption that you wanted a quick trial, and I am very happy to get millions of documents if necessary to get the complete discovery. I do want complete discovery. I think that you are perfectly right in saying that we should go a stage at a time, but you did give us a fall period, and I am only trying to --

THE COURT: I think the best way to insure we make that fall trial date is to take our discovery in stages. And if we take fairly clear-cut discovery demands and the defendants will comply with those demands promptly and we don't have a lot of motion practice in the course of it, we are going to get farther faster than otherwise.

Now, why don't you, if you could do this, Mr. Person, we are going to have a meeting next week, and we will have -- and I think we will devote next week to discovery because we will have a little bit of a narrowing of the issues, but if we could have -- if you could pick out, and if you could prepare another memorandum about discovery relating to Nabcor, what you feel in the way of documents and other types of discovery about Nabcor, and if you could take Nabcor and the other plaintiffs, obviously you want discovery from the other plaintiffs.

Now, as far as other defendants, isolate initially the parties with whom these people, these plaintiffs, dealt or attempted to deal, and work out a plan for initially getting information and documents from these defendants about their dealings or their intentions or plans or whatever they did about Nabcor. That, it seems to me, is fairly clear-cut and can be complied with quickly, and I would ask the defendants to begin, they probably already have, getting

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together any and all documents in their files about Nabcor, transactions with Nabcor, anything about Nabcor or any other plaintiffs, and get that material together and then when we decide what discovery, they can be produced fast.

I think we will adjourn at this point. We can set a date. I think at 3:30 next Friday.

Thanks a lot.

(Adjourned at 5:45 p.m.)

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Opinion #40560

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x
:
NATIONAL AUTO BROKERS CORP., et al., :
Plaintiffs, :
v. : 70 Civ. 5421A
GENERAL MOTORS CORPORATION, et al., : OPINION
Defendants. :
- -x

GRIESA, J.

This is an action, involving mainly antitrust charges, brought by a company called National Auto Brokers Corp. ("Nabcor") against General Motors, Ford, Chrysler and American Motors and other defendants.

As will be described in more detail shortly, Nabcor claims to have organized a system of franchised brokers, who, for modest fees, act as agents for retail auto buyers, and arrange for purchases of automobiles from automobile dealers at substantially less than regular retail prices. According to the complaint, the alleged Nabcor organization consists basically of Nabcor at the top of a system of brokers to which Nabcor sells franchises. Beneath Nabcor, there are three levels of brokers: "master brokers", "area brokers" and simply brokers.

The four auto manufacturer defendants have moved for partial summary judgment dismissing the claims in the complaint made under the Robinson-Patman Act and certain other claims. The motions are granted in part and denied in part.

Plaintiffs have moved for class action treatment. In an unreported bench decision of November 7, 1973, I denied this motion as to one of the classes sought to be represented. In the present opinion I am denying plaintiffs' motion as to the other class.

The Parties and Certain Prior Proceedings

The original complaint, filed December 10, 1970, contained 27 counts. Counts 9-13, relating to advertising practices of various newspaper defendants, were severed from this action on March 2, 1973, National Auto Brokers Corp. v. General Motors Corp., 1973 CCH Trade Cas. ¶ 74,405 (S.D.N.Y. 1973), and were assigned docket number 70 Civ. 5421B.

The instant action now bears docket number 70 Civ. 5421A. The complaint charges numerous violations of the antitrust laws by defendant automobile manufacturers, various dealers franchised by the manufacturers, financial institutions and other parties named as defendants and co-conspirators, directed against plaintiff Nabcor and its organization.

There are ten named plaintiffs. The first three plaintiffs are Nabcor, and Frank Maiorana and Anthony Maiorana, the principals of Nabcor.

Plaintiff General Auto Sales & Leasing, Inc. is alleged to have been, from 1967 to 1970, a Nabcor "master broker" in Lancaster, New York. This is said to be the second tier in the Nabcor organization. Plaintiff Dale Strimpel was the principal of General Auto Sales.

Plaintiff Nabcor of East New York, Inc. ("Nabcor East") is alleged to be a master broker in Yonkers, New York.

Plaintiff Courtesy Auto Brokers, a partnership, is alleged to have been, from February to December 1968, an "area broker" (the third tier in the Nabcor organization) in Huntington Station, New York.

Plaintiff Robert B. Heim is alleged to have been doing business as Robert Heim Auto Sales in Bethlehem, Pennsylvania, and to have acted as a Nabcor area broker in 1969-70.

Plaintiff Louis H. Jamele is alleged to operate Lou's Auto Mart in Middlebury, Connecticut and Waterbury, Connecticut, and is alleged to be Nabcor broker.

Plaintiff Alfred J. Young is alleged to do business as A. J. Young, Sr. Auto Sales in Watertown, New York, and is alleged to be a Nabcor broker.

Plaintiffs moved for class action treatment, seeking to represent two classes, one called the "broker class" and consisting of Nabcor and the 250 or so brokers in the Nabcor organization; the other, called the "retailer class", consisting not only of Nabcor and its 250 brokers, but also all regular franchised auto dealers, all companies engaged in the automobile fleet leasing business, and all other brokers such as Nabcor. The total membership of this retailer class was allegedly about 42,000. On November 7, 1973, in an unreported bench decision, this Court denied class action treatment with respect to the retailer class except for the Nabcor organization, and reserved decision as to class action status for the broker class. The latter issue will be dealt with later in this opinion.

Summary Judgment Motions

It should be stated at the outset that my rulings on the summary judgment motions relate only to claims of the named plaintiffs in this action. I am not ruling as to possible claims of parties not before the Court, including absent members of the Nabcor "broker class".

Summary of Counts

The following is a summary of the counts involved in the summary judgment motions. Counts 14-17 are brought by and on behalf of Nabcor and its broker-franchisees against General Motors, Ford, Chrysler and American Motors and allege price and other discrimination in violation of Sections 2(a), 2(d) and 2(e) of the Robinson-Patman Act, 15 U.S.C. §§ 13(a), 13(d) and 13(e). Counts 16 and 17 also refer to Section 2(f) of the Act. 15 U.S.C. § 13(f).

Counts 18-27 were originally brought on behalf of the entire "retailer class" referred to earlier. The Court has already denied class action treatment to the retailer class, except as to the Nabcor organization. Thus Counts 18-27 will only be considered with respect to Nabcor and its broker-franchisees. Counts 18-27 are brought against the four auto manufacturer defendants.

Counts 18-20 are brought under Sherman Act §§ 1, 2 and 3 respectively (15 U.S.C. §§ 1, 2 and 3) and allege illegal practices by the auto manufacturers regarding "destination charges".

Count 21 alleges that the destination

charges involve price discrimination in violation of Robinson-Patman Act § 2(a).

Count 22 alleges that the destination charges involve unlawful tying in violation of Clayton Act §3, 15 U.S.C. § 14.

Count 23 accuses the manufacturers of common law fraud in connection with the destination charge.

Counts 24-26 are further charges of price discrimination under Robinson-Patman Act § 2(a). Count 27 alleges "service discrimination" under Robinson-Patman Act § 2(e).

The auto manufacturer defendants seek, on their summary judgment motions, dismissal of Counts 14-17 and 21-27, and Counts 18-20 as to all plaintiffs except Nabcor. These defendants also seek dismissal of *certain* of the claims of Nabcor asserted in Counts 18-20.

Statutory Provisions

Section 2(a) of the Robinson-Patman Act, the price discrimination provision, provides in relevant part as follows:

> "(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or

> tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: . . . *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: . . ." 15 U.S.C. § 13(a).

Section 2(d), which bars discriminatory payments by a seller to a buyer for promotional services, provides:

> "(d) It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment of consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities." 15 U.S.C. § 13(d).

Section 2(e), which prohibits discriminations in promotional services when the seller furnishes the service to the buyer, provides:

> "(e) It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser

> or purchasers, of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms." 15 U.S.C. § 13(e).

Section 2(f) of the Robinson-Patman Act provides:

> "(f) It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section." 15 U.S.C. § 13(f).

Certain other statutory provisions are relevant, but need not be quoted at this point.

Grounds for Summary Judgment Motions

Defendant auto manufacturers assert that all of the Robinson-Patman Act claims should be dismissed because plaintiffs are not "purchasers" or "customers" within the meaning of the statutory provisions, but are instead merely purchasing agents for the real purchasers or customers -- the ultimate car buyers. The moving defendants also contend that, in any event, plaintiffs are not purchasers _from_ or customers _of_ the auto manufacturers, as required by the statutory provisions.

Defendants assert that if plaintiffs purchased automobiles at all, such purchases were made from franchised auto dealers, not from the auto manufacturers.

Defendants make another contention specifically directed to certain Robinson-Patman Act claims of discrimination against Nabcor and its brokers in favor of "fleet purchasers" of automobiles. Defendants contend that such fleet purchasers are not in competition with Nabcor and its brokers.

Specifically as to Count 27, alleging that defendant manufacturers solicit fleet sales and direct these sales to certain favored dealers rather than to Nabcor, defendants urge that the claim is groundless since plaintiffs admit that they have never sold to fleet buyers and have never intended to do so.

With regard to the Sherman Act claims for alleged overcharges (Counts 18-20), defendants assert that plaintiffs sustained no injury because these overcharges were passed on in their entirety. The same defense is asserted with respect to the common law fraud claim (Count 23) regarding the alleged overcharges.

As to the Clayton Act § 3 claim (Count 22), alleging that certain unlawful "destination charges" were imposed, defendants contend that the claim in effect alleges the tying of a service to a commodity --

something not covered by the statute.

Nabcor's System of Business

Plaintiffs assert that there is a sharp differentiation between the Nabcor system and regular franchised automobile dealers. In the first place, Nabcor and its brokers deal in any brand of automobile. Nabcor is not franchised by any auto manufacturer, and its brokers generally have no such franchises.

Another claimed distinction between the Nabcor system and regular franchised auto dealers is that the Nabcor brokers generally do not have retail show rooms or repair shops and do not need to make large capital or overhead expenditures. The complaint alleges that for this reason "the Nabcor organization was able to sell new automobiles of any make or model at a markup substantially discounted from the markup needed or desired by franchised dealers" (par. 107).

However, the Nabcor organization obtains its cars from regular franchised automobile dealers. When Nabcor started its business in 1966, its concept was that it would purchase automobiles from these franchised dealers on a "fleet" or wholesale basis.[1] The complaint alleges that from 1966 to the time of the filing of the action (December 1970) plaintiffs purchased more than 1,000 new automobiles from franchised automobile dealers.

[Fn. 1 on p. 11]

The "Purchaser"-"Customer" Issue

As the statute itself indicates, in order to maintain a cause of action under Section 2(a) of the Robinson-Patman Act, the plaintiff must be a purchaser from the person charged with the discrimination. Klein v. Lionel Corp., 237 F.2d 13, 14-15 (3d Cir. 1956). Mere sales agents are not covered. Loren Specialty Mfg. Co. v. Clark Mfg. Co., 360 F.2d 913, 914-15 (7th Cir.), cert. denied, 385 U.S. 957 (1966). Section 2(e) also applies only to purchasers. Section 2(d) uses the term "customer", which is given the same meaning as the term "purchaser" in Sections 2(a) and 2(e). American News Co. v. FTC, 300 F.2d 104, 109 (2d Cir.), cert. denied, 371 U.S. 824 (1962).

The moving defendants contend that none of the plaintiffs was a purchaser or customer within the meaning of the Robinson-Patman Act.

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[1] According to a document entitled "Nabcor Marketing and Administration Manual" the Nabcor concept was given some encouragement by the Supreme Court decision in United States v. General Motors, 384 U.S. 127 (1966), in which the Court held that it was illegal for General Motors and certain Chevrolet dealers to attempt to prevent other Chevrolet dealers from selling cars at low prices to discount houses.

According to the complaint, the "markup" made by the Nabcor organization actually consists of what plaintiffs call a "brokerage commission" (pars. 5(ii) and 107). The complaint alleges that this brokerage commission is usually about $200.

Defendants contend that the Nabcor organization is solely a system of brokers or agents, representing the ultimate car buyers for a commission. Defendants assert that these car buyers are the only purchasers or customers in the transactions.

Defendants assert that the facts admitted by plaintiffs demonstrate that Nabcor takes title to the cars, if at all, only in the most technical sense; that Nabcor risks no funds and maintains no inventory; that Nabcor places orders with franchised dealers only after it receives an order from a consumer buyer.

The trouble is that there are other parts of the record which at least raise triable issues of fact on the question of whether plaintiffs, or some of them, made purchases of automobiles, as distinct from merely acting as agents.

Certain documents in the record, including sample purchase forms, indicate that there were two steps in the typical transaction which might properly be characterized as sales. According to the sample forms, the car buyer would give the Nabcor broker a "power of attorney" to purchase a specified car from Nabcor. Then Nabcor would purchase the car from a franchised dealer of one of the manufacturers. The record contains examples of invoices from auto dealers reciting that certain cars were "sold to Nabcor Inc."

Apparently the Nabcor concept is that Nabcor would act as the central purchaser for all cars ordered through the system, although, under certain circumstances, brokers might order directly from a franchised dealer.

Plaintiffs have conceded that those brokers who merely obtained a power of attorney from a customer and transmitted an order to Nabcor are not purchasers or customers within the meaning of the Robinson-Patman Act. Of the named plaintiffs, this concession would apply to Courtesy, Heim, Jamele and Young. However, plaintiffs contend that General Auto Sales and Nabcor East purchased a few cars directly from franchised auto dealers. And, more important, plaintiffs contend that

Nabcor has purchased several hundred, or perhaps about 1,000, cars from franchised dealers. Plaintiffs therefore contend that Nabcor, General Auto Sales and Nabcor East are purchasers and customers within the meaning of the Robinson-Patman Act.

The moving defendants are entitled to summary judgment dismissing all the Robinson-Patman Act counts (Counts 14-17, 21, 24-26) as to plaintiffs Courtesy, Heim, Jamele and Young, on the ground that these plaintiffs were not purchasers or customers but were merely agents. However, on this question, the present record demonstrates that there are triable issues of fact relating to plaintiffs Nabcor, Nabcor East and General Auto Sales.

An alternative contention of defendants is that, even if Nabcor, Nabcor East and General Auto Sales can be considered to be purchasers or customers, as distinct from being mere agents, nevertheless these plaintiffs were not purchasers from or customers of, any of defendant manufacturers, since these plaintiffs did not buy from the manufacturers, but only from franchised dealers.

On this issue, which is somewhat complex, one of the problems is that defendants have not undertaken to analyze in any detail the specific elements of the various counts. Defendants have taken the position that "it is unnecessary to sort out plaintiffs' intricate allegations" (Memorandum of June 25, 1973 p. 11), and contend that they have a defense which cuts across all the Robinson-Patman claims and conclusively defeats them. I do not blame defendants for trying to simplify the case. But after some amount of struggle with defendants' contentions, I have concluded that the only sure way to deal with plaintiffs' claims is in fact to analyze them in all their aspects and details. Unfortunately, when this is done, issues are revealed which defendants have not dealt with in their summary judgment motions.

Let us take, for instance, defendants' assertion that purchases from franchised auto dealers are not purchases from the manufacturers, and therefore no Robinson-Patman Act claims against the manufacturers will lie.

Count 14 alleges that each of the defendant manufacturers adds to the wholesale price of a new automobile sold to a franchised dealer an amount ranging from $15 to $25, which is turned over by the manufacturers to dealer organizations or associations to be spent on advertising for the benefit of the dealers. It is alleged that leasing companies and fleet purchasers[2] are not required to pay these advertising contributions or, if they do, they receive a refund of the whole amount of such contributions from the manufacturers. It is alleged that Nabcor receives no refund of any part of such advertising contributions, which are paid by Nabcor as part of the price it pays to the franchised dealers.

Nabcor contends that it is in competition with the leasing companies who lease cars to customers on a long-term basis. Plaintiffs contend that such leases, especially if there is an option to buy at the end, are the "functional equivalent" of sales. Nabcor contends that the auto manufacturers discriminate in favor of these long-term leasing companies by making refunds of the advertising contributions to them, but not making such refunds to Nabcor.

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[2] The record indicates that leasing companies and other fleet purchasers usually buy their cars from franchised dealers, not directly from the manufacturers.

Thus Count 14 alleges that certain competitors of Nabcor, although they purchase cars from dealers and not from the manufacturers, nevertheless are later granted monetary benefits directly by the manufacturers, which are not granted to Nabcor. Certain other Robinson-Patman counts allege that the auto manufacturers reach over the heads of the franchised dealers and confer benefits directly upon the long-term leasing companies, which are not conferred upon Nabcor. Count 16 alleges that the auto manufacturers make "warranty programs" available to leasing companies. It is alleged that under such programs leasing companies are permitted to perform their own warranty work on new automobiles they purchase and are compensated by the manufacturers for parts and labor in connection with such work. Count 24 alleges that the leasing companies receive directly from the manufacturers a "fleet rebate" amounting to 1-5% of the wholesale price of cars purchased. Count 17 alleges that these and certain other benefits are made available directly by the manufacturers to leasing companies who have "fleet certificates".

The question naturally arises as to whether, under these allegations, the leasing companies might be considered to be purchasers from, or customers of, the auto manufacturers, because of the fact that the manufacturers have involved themselves directly in the sales transactions, even though the actual purchases were initially made from dealers, not from the manufacturers. Another question which necessarily follows is this: If the manufacturers reach over the heads of the franchised dealers and confer pricing and other benefits on Nabcor's alleged competitors, which they do not grant to Nabcor, does Nabcor have a valid claim for discrimination under the Robinson-Patman Act against the manufacturers?

This is, in my view, the precise issue which Nabcor is raising in its Robinson-Patman Act claims of discrimination by the manufacturers in favor of the leasing companies. But the moving defendants do not address themselves to this problem in the briefs and affidavits which they have filed on the present motions.

To be sure, when this issue was raised at oral argument, there was considerable discussion. But such discussion does not, in my opinion, lay the matter to rest sufficiently to justify summary judgment.

Indeed, the discussion at the oral argument indicated that the issue cannot be resolved simply on the basis that the actual purchases are made from the franchised dealers, and not from the auto manufacturers. Defense counsel conceded that if a franchised dealer makes auto sales to two leasing companies and then the manufacturer reaches over the dealer and gives a refund to one leasing company at one rate and a refund to the second leasing company at a lesser rate, then there would be a Robinson-Patman Act cause of action against the manufacturer, because the manufacturer "tried to involve itself in a sale" (Minutes of February 26, 1974 pp. 17-18).

Defense counsel urge that the hypothetical example has no application to Nabcor's claims. The argument is that in the hypothetical case the auto manufacturer intends to deal, and does actually deal, with both of the leasing companies. Defense counsel contend that the record in the present case demonstrates conclusively that the auto manufacturers do not intend to deal, and do not in fact deal, with Nabcor or its franchisees. The auto manufacturers argue that they are exercising their right not to deal with Nabcor -- a right enunciated in United States v.

Colgate, 250 U.S. 300, 307 (1919), and expressly embodied in Section 2(a) of the Robinson-Patman Act.

The manufacturer defendants may well be right in their position. But I am forced to conclude that the issue has not been dealt with sufficiently on the present summary judgment motions to justify a ruling in defendants' favor at this juncture.

I should mention at this point the contention of the manufacturer defendants that there can be no valid claims under Sections 2(d) and 2(e) of the Robinson-Patman Act for discrimination in favor of the fleet purchasers and leasing companies because they do not resell in competition with Nabcor. Section 2(e) outlaws discrimination in favor of one purchaser against another purchaser "on a commodity bought for resale". Section 2(d) outlaws discrimination among "customers competing in the distribution" of the products. It has been held that the term "distribution" in Section 2(d) does not differ in meaning from the term "resale" in Section 2(e). Clairol Inc. v. FTC, 410 F.2d 647, 648 (9th Cir. 1969).

Plaintiffs have in effect conceded that, as far as their Robinson-Patman claims of discrimination in favor of fleet purchasers and leasing companies are concerned, such claims are limited to situations involving long-term leasing companies, which are said to make the functional equivalent of sales (Minutes of February 26, 1974 pp. 4-9).

In response, the manufacturer defendants have cited certain cases to indicate that leases cannot be considered to be resales within the meaning of Sections 2(d) and 2(e) of the Robinson-Patman Act. However, in my view, none of these authorities is close enough in point to permit summary judgment in favor of defendants on this issue or to preclude possible factual issues about whether a long-term lease is the functional equivalent of a sale.

In any event, the argument about the requirement of "resale" applies only to claims under Sections 2(d) and 2(e). Defendants do not argue that there is the same requirement under Section 2(a). Defendants have not attempted to actually analyze what sections of the Robinson-Patman Act might cover the specific claims of discrimination made in the complaint. However, it would seem to me that the claims relating to discriminatory refunds of advertising contributions and discriminatory rebates in Counts 14, 17 and 26 would fall under Section 2(a), rather than under Sections 2(d) and 2(e). Thus defendants' argument about "resale" would not apply to such claims.

For all the foregoing reasons, I am denying the motions of the manufacturer defendants for summary judgment as to Counts 14, 16, 17 and 24, insofar as those counts allege discrimination by the manufacturers against plaintiffs and in favor of leasing companies.

A number of the Robinson-Patman Act claims allege discrimination by the manufacturers against Nabcor and its franchisees in favor of the franchised dealers. Such claims can, at the most, be made by those plaintiffs who have actually purchased cars -- Nabcor, Nabcor East and General Auto Sales.

I agree with the moving defendants that such claims are on their face somewhat anomalous. It is difficult to see how the Robinson-Patman Act requires auto manufacturers to assure that a party such as Nabcor purchasing *from* a franchised dealer will receive equal treatment on price and promotional services to that received by the franchised dealers.

The statute generally contemplates situations where the favored and the disfavored purchasers or customers are buying directly from the same source of supply. An exception has been made to provide a cause of action under Section 2(d) for a retailer buying indirectly -- *i.e.*, through a wholesaler -- where the supplier has discriminated in favor of a direct-buying retailer. *FTC v. Fred Meyer, Inc.*, 390 U.S. 341 (1968).

Defendants assert that the *Fred Meyer* rule has no application to the present case. Defendants assert that in *Fred Meyer* the suppliers intended to have their products distributed through the indirect-buying retailers as well as through the direct-buying retailers, whereas in the present case the auto manufacturers do not desire or intend to use Nabcor in their distribution system, and are in no way required to do so. Also, in *Fred Meyer* the discrimination which was proscribed was not between the indirect-buying retailers and their intermediate sources of supply -- i.e., the wholesalers. Indeed the Court in Fred Meyer stated that Section 2(d) "was meant to impose proportional equality only where buyers competed on the same functional level". 390 U.S. at 356. Thus, according to defendants, Fred Meyer cannot be construed as requiring an automobile manufacturer to provide equal treatment as between its franchised dealers, and Nabcor, which purchases from the dealers and is at the next level of distribution.

But the Court in Fred Meyer stated:

> "We recognize that it would be both inappropriate and unwise to attempt to formulate an all-embracing rule applying the elusive language of the section to every system of distribution a supplier might devise for getting his product to the consumer." 390 U.S. at 357.

Indeed, there is some authority for the proposition that a supplier may have obligations of equal treatment under Sections 2(d) and 2(e) to a retailer purchasing from that supplier, and to another retailer purchasing from the first retailer. FTC Guides for Advertising Allowances and Other Merchandising Payments and Services, 16 C.F.R. §§ 240.3(b), which states:

> "(b) 'Competing customers' are all businesses that compete in the resale of the seller's products of like grade and quality at the same functional level of distribution regardless of whether they purchase direct from the supplier or through some intermediary.
>
> > "Example 1: A manufacturer sells to some retailers directly and to others through wholesalers. Retailer 'X' purchases the manufacturer's product from a wholesaler and resells some of it to retailer 'Y.' Retailer 'X' is a customer of the manufacturer. Retailer 'Y' is not a customer unless the fact that he purchases the manufacturer's product is known to the manufacturer."

Under this guideline there are at least two questions of fact on the issue of whether Retailer "X" and his customer, Retailer "Y", are both "competing customers" of the manufacturer. The first question is whether these two retailers compete in the resale of the manufacturer's products. The second is whether the manufacturer knows about the purchases made by "Y" from "X".

Defendants challenge both the authority and applicability of these FTC guides. Defendants may well be correct. The problem is that here again the moving defendants have not sought to apply their arguments to any detailed analysis of the specific

Robinson-Patman discrimination claims made in the complaint. This difficulty is illustrated if we look once more at Count 14 of the complaint. As already described, this count relates to the alleged advertising contributions, and asserts that such contributions are levied by the manufacturers upon the franchised dealers and then paid by the manufacturers to dealers' associations for advertising benefiting the dealers. As noted earlier, one phase of Count 14 is a claim of discrimination against Nabcor and in favor of leasing companies, because of the fact, as alleged, that the auto manufacturers refund the amounts of the contributions to the leasing companies, but make no such refunds to Nabcor.

Count 14 also makes a claim of Robinson-Patman Act discrimination against Nabcor in favor of the franchised dealers. Count 14 (par. 144) alleges that the effect of the advertising contribution practice is to:

> "(a) Require Nabcor to pay for advertising for the benefit of franchised dealers who may be in competition with Nabcor or any of its franchisees."

Clearly the claim of discrimination in favor of the franchised dealers is not a Section 2(a) claim, because there is no price concession given to the dealers. Indeed, the dealers are paying the advertising contribution. Also, this is clearly not a promotional payment claim under Section 2(d) since no such payments are being made by the manufacturers to the dealers.

The matter is not so simple as far as Section 2(e) is concerned. Plaintiffs are apparently claiming that the manufacturers are furnishing, or contributing to the furnishing of, advertising services for the benefit of the dealers, which do not benefit Nabcor and its franchisees. Nabcor further contends that it competes with the dealers for retail sales, having purchased cars from the dealers at wholesale, or near wholesale, prices.

Are the manufacturer defendants entitled to summary judgment on this claim? In my view, it would be inappropriate to grant such judgment, when defendants have not analyzed or met the claim squarely. The same is true with respect to all the other claims of discrimination in favor of the franchised dealers, except for Count 27, which will be dealt with shortly. The other counts containing such claims aside from Count 14, which has been discussed, are Counts 15, 16, 25 and 26.

As to all the claims of discrimination against Nabcor in favor of the franchised dealers contained in Counts 14, 15, 16, 25 and 26, the motions for summary judgment are denied.

Count 27

Count 27 alleges that the manufacturer defendants have violated Section 2(e) of the Robinson-Patman Act by directing prospective fleet purchasers of automobiles to the franchised dealers, but not directing them to Nabcor. There are conclusive admissions in the record that the Nabcor organization has never made sales to fleet purchasers, and does not intend to make such sales. Defendants are entitled to summary judgment dismissing Count 27.

Counts 18-23

Counts 18-23 (pars. 166-178) allege in essence that the four manufacturer defendants include a so-called "destination charge" in the price charged to dealers for new cars, which purports to be a freight charge but which allegedly exceeds the actual costs of transportation. Two types of injury allegedly flow from the distribution charges. First, it is claimed that the destination charge is in part an illegal overcharge to the dealers (Complaint pars. 170(d) and (e)). Second, it is claimed that the destination charge is calculated in such a way as to prevent dealers from transporting automobiles from one area to another (Complaint pars. 170(f) and (g)). This is the so-called "transshipment" theory. Regarding the latter theory, the manufacturer defendants are willing to construe it as encompassing a claim that Nabcor was prevented from freely arranging for the shipment of automobiles from one area to the other.

The manufacturer defendants move for summary judgment dismissing Counts 18-20 except with respect to the "transshipment" claim made by Nabcor. These defendants also move for summary judgment as to Counts 21-23 in their entirety.

Counts 18-20 are brought under the Sherman Act. Count 21 is brought under Section 2(a) of the

Robinson-Patman Act. Count 22 is brought under Section 3 of the Clayton Act. Count 23 is based on the theory of common law fraud.

The main thrust of all of these counts is a claim of injury to franchised auto dealers because of the allegedly illegal destination charges they are compelled to pay. Counts 18-23 were originally brought on behalf of classes defined to include all franchised automobile dealers. In my bench decision of November 7, 1973 I ruled that plaintiffs could not represent these franchised dealers. The question remains as to whether Nabcor and its franchisees have any valid causes of action based on the destination charges made by the manufacturers to the dealers.

The manufacturer defendants contend that it is clear beyond any triable issue of fact that, to the extent that any destination overcharges were paid by Nabcor and its franchisees (as part of the prices paid to the franchised dealers), such overcharges were entirely passed on to Nabcor's customers. Defendants are clearly correct on this point.

Plaintiffs have now conceded that, with a few exceptions which can be eliminated on the ground of insubstantiality, Nabcor and its franchisees transact their business on a pure cost-plus basis. That is, they pass on to their customers the entire cost which Nabcor pays to the dealers, and add a fixed commission or brokerage fee constituting compensation to the Nabcor organization. Under these circumstances Nabcor and its franchisees have no valid antitrust cause of action for the alleged overcharges. Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 494 (1968); Obron v. Union Camp Corp., 355 F. Supp. 902 (E.D. Mich. 1972), aff'd, 477 F.2d 542 (6th Cir. 1973); West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710 (S.D.N.Y. 1970), aff'd, 440 F.2d 1079 (2d Cir.), cert. denied, 404 U.S. 871 (1971).

This passing-on defense requires the granting of the summary judgment motions to dismiss Counts 18-20 and 23, except for Nabcor's transshipment claim in Counts 18-20.

Summary judgment should also be granted dismissing Count 21 in its entirety. This is a Robinson-Patman Act claim alleging discrimination against certain franchised auto dealers in favor of other franchised auto dealers. Such a claim clearly cannot be maintained by Nabcor and its franchisees, and I would not interpret Count 21 even to so allege.

Plaintiffs have conceded that Count 22 does not state a valid claim under Section 3 of the Clayton Act. They consent to summary judgment on Count 22 as now stated, but indicate that they wish to amend to assert the claim under Section 1 of the Sherman Act. No such leave to amend will be granted. If plaintiffs were to assert Count 22 under the Sherman Act, this would simply bring it within the ambit of Counts 18-20, which have already been disposed of as described above.

Recapitulation of Summary Judgment Rulings

The motions of the auto manufacturer defendants for summary judgment are granted to the following extent:

(1) Counts 21, 22, 23 and 27 are dismissed in their entirety.

(2) Counts 18-20 are dismissed, except as to the transshipment claim of Nabcor.

(3) Counts 14-17, 24-26 are dismissed as to plaintiffs Courtesy Auto Brokers, Heim, Jamele and Young.

Except as thus granted, the motions for summary judgment are denied.

Class Action Motion

The remaining question to be dealt with is whether plaintiffs can maintain this as a class action on behalf of the alleged class of Nabcor broker franchisees. The complaint alleges that from 1966 to the time this action was commenced in December 1970, a total of about 200 Nabcor franchises were granted, of which 70 were still active.[3] An affidavit filed by plaintiffs on their class action motion asserts that the total number of franchises granted was about 250.

The only counts of the complaint now open for consideration regarding class action treatment are Counts 1-7 of the complaint. On November 23, 1973 I dismissed Count 8 of the complaint. As already described, Counts 9-13 have been severed. Moreover, the effect of my rulings in the earlier part of the present opinion is to preclude class claims on behalf of any absent broker-franchisees on Counts 14-27 of the complaint. Certain of these counts were dismissed in their entirety. As to the remainder of these counts not dismissed in their entirety, such remaining counts have been dismissed as to those plaintiffs who have acted merely as brokers and have not made any actual purchases of automobiles. Plaintiffs do not claim that any absent members of the broker-franchisee class made any actual purchases of automobiles, as distinct from being mere brokers. Thus there is no basis for asserting any of Counts 14-27 on behalf of any absent members of the alleged broker-franchisee class.

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[3] A Nabcor offering circular of April 29, 1971 defined an "active" franchisee as one who had sold at least one new automobile during the preceeding 12 months.

Counts 1-3 of the complaint allege that Ford, General Motors, various franchised dealers of each, and various newspapers and financial institutions, engaged in illegal activities designed to injure the business of Nabcor and its franchisees and to prevent them from effectively competing with regular franchised dealers of General Motors and Ford. Counts 1-3 are brought respectively under Sections 1-3 of the Sherman Act.

Count 4 alleges that General Motors and Ford undertook certain acquisitions of auto dealers in violation of Section 7 of the Clayton Act.

Counts 5-7 are directed against all four auto manufacturers, General Motors, Ford, Chrysler and American Motors. These counts are based respectively on Sections 1-3 of the Sherman Act. They allege that each of the auto manufacturers makes available to its franchised dealers a warranty program, under which the dealers could perform warranty repair work on new cars and be paid for the labor and parts involved. It is alleged that such warranty programs have not been made available to Nabcor.

Counts 5-7 are indeed puzzling, in view of the fact that other allegations in the complaint, and numerous publicity statements of Nabcor, emphatically disown Nabcor's intention of setting up facilities to do warranty or any other repair work.

It is undoubtedly true, as defendants have stated, that the chief focus of plaintiff's case is their claim that General Motors and Ford and others have conspired to boycott Nabcor and its franchised brokers (Memorandum of June 29, 1973 p.1). This is the claim embodied in Counts 1-3 of the complaint.

As an initial proposition, it would seem desirable to permit the claims of Nabcor and its franchisees regarding the boycott against them to be handled on a class basis. One might suppose that there would be a central core of common issues as to whether there was a conspiracy to put Nabcor and its brokers out of business. A class action would permit a single trial of these common issues. Individual issues regarding injury and damage could be handled in an appropriate manner. See Green v. Wolf Corp., 406 F.2d 291, 301 (2d Cir. 1968), cert. denied, 395 U.S. 977 (1969).

I should here note that the propriety of class action treatment must be judged according to whether the action meets the requirements of Subdivision (b)(3) of F.R. Civ. P. 23. This subdivision provides for class action treatment in instances where questions of law or fact common to the members of the class predominate over any questions affecting only individual members.[4]

I have come somewhat reluctantly to the conclusion that, for several reasons, class action treatment for the alleged broker-franchisee class is not appropriate. In the first place, there is grave doubt, to say the least, that there is a sufficient core of common issues on the counts of the complaint in question to justify class action treatment.

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[4] Plaintiffs cannot avoid the requirements of Subdivision (b)(3) of Rule 23 by placing it under the injunction provision of Subdivision (b)(2). It is true that plaintiffs ask for certain injunctive relief. But this does not avoid the necessity of considering the damage claims, which are certainly essential to the case, under Subdivision (b)(3). See Free World Foreign Cars, Inc. v. Alfa Romeo, 55 F.R.D. 26, 29-30 n.9 (S.D.N.Y. 1972); 3B J. Moore, Federal Practice ¶ 23.01 [10.-3] (2d ed. 1969). Nor is this an appropriate case under Subdivision (b)(1), which was designed for entirely different situations from what is presented here. See Advisory Committee Notes; 3B J. Moore, Federal Practice ¶ 23.35[2] (2d ed. 1969).

An analysis of the complaint indicates that plaintiffs are not really claiming a single central conspiracy, but a variety of conspiracies, mostly local in nature affecting individual Nabcor franchisees.

What is actually alleged is that, after the various Nabcor broker-franchisees started doing business, their customers began requesting warranty repair work from the regular auto dealers. It is alleged that the regular auto dealers did not look with favor upon performing warranty work on automobiles sold by Nabcor. The complaint alleges (par. 109):

> "In light of these apparent difficulties for many franchised dealers, the unlawful conspiracy or combination developed, the Plaintiffs allege, to assist the franchised dealer in preserving the territorial exclusive of his franchise."

The complaint goes on to claim (par. 110) that local auto dealers would have power and influence with local banks, newspapers, better business bureaus, and motor vehicle bureaus. It is alleged that these auto dealers would use such influence to persuade the banks to refuse financing for Nabcor brokers and customers; to persuade the newspapers to refuse advertising to Nabcor brokers; to persuade better business bureaus to hinder the registration of automobiles sold through Nabcor brokers.

To be sure, the complaint alleges that the General Motors dealers enlisted the aid of General Motors, and the Ford dealers enlisted the aid of Ford, in order to assist the dealers in their anti-competitive activities. It is further alleged that both General Motors and Ford, and their top officers, took various actions to injure the business of the Nabcor organization. But the point remains that the complaint alleges a variety of local conspiracies, which may well be as important, or more important, than the alleged general conspiracies emanating from the headquarters of General Motors and Ford. It should be noted that there appears to be no contention of a conspiracy between General Motors and Ford.

Defendants contend that predominant individual issues are presented on the issues of injury and quantum of damages with respect to each broker-franchisee. Both of these elements must be proved in a private antitrust damage action. 15 U.S.C. § 15; Winckler & Smith Citrus Prods. Co. v. Sunkist Growers, Inc., 346 F.2d 1012, 1014 n.1 (9th Cir.), cert. denied, 382 U.S. 958 (1965); Carswell Trucks, Inc. v. International Harvester Co., 334 F. Supp. 1238 (S.D.N.Y. 1971).

If it were true that the present case involved only a claim of a single central conspiracy affecting all the broker-franchisees, then it is conceivable that a format might be worked out under Rule 23 for class treatment even of the individual issues, if there were a limited number of persons in the class, and if it could be forseen that the individual issues would not involve undue amounts of depositions, trial witnesses, etc.

But the totality of circumstances in the present case makes it clear that we do not have such a situation. When we combine the scattered and diffuse nature of the alleged conspiracies with the nature of the individual issues regarding injury and damage, it becomes apparent that this action is not appropriate for class action treatment.

This is amply demonstrated by the discovery taken thus far respecting the claims of the named plaintiffs in the action. It should be noted at the outset that the "claims" as revealed in this discovery bear little resemblance to the claims as outlined in the complaint. The complaint is that Nabcor and its brokers were shut out from supplies of automobiles, and were prevented from obtaining advertising. It is also alleged that Nabcor customers were prevented from obtaining financing and warranty repair work, and were even hindered in having cars registered.

Plaintiff Courtesy Auto Brokers was in business as a Nabcor area broker from February until December 1968, during which time it participated in only one automobile transaction. Courtesy makes no claim of being denied automobiles, advertising or financing. Peter Cucci of Courtesy was called once by the Suffolk County District Attorney who asked about whether Courtesy was improperly operating without a license, and apparently concluded that it was not. Cucci has testified that

Courtesy's going out of business had nothing to do with any action by General Motors, Ford or any franchised dealer.

Plaintiff Young was in business as a Nabcor broker, and then master broker, from May 1967 until he went bankrupt in March 1971, although he claims to have resumed some limited activity in September 1972. He made no attempt to buy cars directly from franchised dealers. He ordered automobiles from plaintiff General Auto Sales, and cites no instance of unfilled requests or orders. Young does not claim that he was ever denied advertising. He states that he was unable to obtain financing from two banks and a credit union, none of which is named as a defendant or co-conspirator. Young claims there were three or four instances where auto dealers refused, or refused temporarily, to perform warranty service on cars bought through Young. In one case, however, the work was done after Young communicated with a General Motors representative.

Plaintiff Heim was a Nabcor area broker from April 1969 until March 1970. Heim never engaged in a single automobile transaction. He never attempted to purchase cars from franchised dealers, and never ordered cars from Nabcor. He does not claim that he or his customers were denied any financing. Heim claims that the Allentown Call-Chronicle said at one time it would run no more advertisements for him until he furnished some information about Nabcor, which he did not provide. Nevertheless, later the Call-Chronicle ran an advertisement for him. Heim claims that the Easton Express refused advertising and asked Heim for information, which Heim did not give. The Allentown Call-Chronicle and the Easton Express were originally joined as defendants, but the action has now been discontinued as to them.

The other broker-plaintiffs -- Nabcor East, General Auto Sales and Jamele -- have perhaps attempted to assert somewhat more in the way of grievances. But it must still be said that their "claims", as set forth in the discovery, fall far short of what is alleged in the complaint. For instance, Jamele made no attempt to purchase automobiles from franchised dealers, and his only possible problem in obtaining cars through Nabcor was the delay in delivery of one Corvette. The claims of Nabcor East and General Auto Sales about being deprived of cars are mainly made up of highly confusing and contradictory assertions about alleged problems with certain local dealers. There are a few claims by one or the other of plaintiffs Nabcor East, General Auto Sales and Jamele regarding mistreatment by local newspapers, financial institutions and motor vehicle officials.

Two points emerge. First, if the claims of the broker plaintiffs are typical of those of the other members of the broker-franchisee class, as they are supposed to be under Rule 23(a), one can only wonder about the utility of using the class action device to draw into litigation more of such "claims".[5]

The second point is that discovery has demonstrated that the claims of individual brokers, to the extent they raise litigable issues at all, involve basically individual, local issues. In order to determine whether this or that problem with a local automobile dealer, a local newspaper, etc. was an illegal anti-competitive act, it would be necessary to uncover all the evidence relating to these individual transactions. Other very real issues in this case would relate to whether an individual broker's failure in business stemmed from illegal acts of the defendants, or from other factors such as the broker's own inadequacy, Nabcor's failure to perform on the franchise agreement, etc.

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[5] It appears that at least some of the plaintiffs other than Nabcor were brought into this action by Nabcor without any real idea of what the complaint would assert on their behalf.

I therefore conclude that the requirements of Rule 23(b)(3) are not met. It appears that the common issues do not predominate over individual issues, and that a class action is not an appropriate or efficient device to be employed in this litigation.

Another reason for denying class action treatment is that I find that there is insufficient assurance that plaintiffs will fairly and adequately protect the interests of the class of broker-franchisees, as required by Rule 23(a). The question presented now, with respect to representation of the alleged broker-franchisee class of 200 or 250 persons, is different from the question dealt with in my bench decision of November 7, 1973 denying class action treatment for an alleged class of 42,000 persons.

The fact that plaintiffs do not have the requisite financial and other ability to represent 42,000 persons does not necessarily mean that plaintiffs lack the ability to represent the 200 or 250 alleged members of its own organization.

At the oral argument of this motion I indicated a tentative view that the latter question could be resolved by simply finding out, perhaps by a questionnaire, whether the Nabcor brokers do or do not wish to have plaintiffs represent them. Defendants oppose such a procedure, contending that it would not solve the real problems respecting class action treatment. I have concluded that defendants are correct.

It should be noted at this point that, although certain brokers are named as plaintiffs in the action, they cannot be considered realistically as representatives of absent members of the alleged broker-franchisee class. The attorney for plaintiffs is Nabcor's attorney. Thus the question regarding representation is whether Nabcor and its attorney can fairly represent the broker class.

Defendants argue that there are conflicts between Nabcor and its brokers which make it inappropriate for Nabcor to represent the alleged broker-franchisee class. These conflicts, according to defendants, arise from actual and potential claims by the brokers against Nabcor for fraud and breach of the franchise agreements. Sixteen lawsuits by brokers against Nabcor on such claims have actually been brought, and judgments against Nabcor have been obtained in at least three of these actions.

The claims are that Nabcor sold broker franchises for fees ranging from $2,500 to $50,500, on the basis of false representations that Nabcor had a nationwide advertising system for the benefit of its brokers; that Nabcor would completely train the new broker; that Nabcor had developed complete financing, insurance programs;and that the brokers were assured of extremely large profits. One was allegedly promised a "minimum first year profit of $384,000".

In order to understand these allegations of extravagant profits, it should be noted that Nabcor master brokers and area brokers were permitted to sell broker franchises to persons in their areas. For instance, Dale Strimple, the principal of plaintiff

General Auto Sales, has testified that Nabcor told him that if he became a master broker he could sell 20 Nabcor broker franchises in each of 50 counties in New York for $5,000 apiece, thereby receiving $5,000,000 on an investment of only $25,000. Strimple says he was told he would earn $900,000 to $1 million a year.

Apparently the brokers who have actually joined as plaintiffs in this action do not claim fraud or breach of contract by Nabcor, and are willing to have Nabcor's attorney represent them. It is the privilege of plaintiff brokers to so determine.

But there is a somewhat different question when it comes to the representation of absent members of the alleged broker-franchisee class. Under Rule 23(a) the Court must make a determination in the interest of such absent persons and in the interest of the orderly prosecution of the lawsuit.

I find that there are actual or potential conflicts between Nabcor and the members of the broker-franchisee class which fundamentally disable Nabcor and its attorney from representing this class. Sixteen lawsuits by brokers undoubtedly indicate problems involving a substantially larger number. Nor are the issues regarding fraud and breach of franchise agreements unrelated to the present case.

One of the defenses most strongly asserted by defendants in this case is that, if the business of individual brokers went badly or failed, this was because the Nabcor business concept was basically faulty and because Nabcor failed, for various reasons unconnected with defendants, to deliver what it had promised to the brokers.

Nabcor has a strong interest in rebutting this defense, and, in a sense, this might seem to assure vigorous representation of the brokers. But Nabcor's interest is in part to protect itself from claims by these brokers. Perhaps the conflict between Nabcor and its brokers might lead Nabcor to be over-zealous, rather than under-zealous, in representing the brokers on particular phases of the case. But regardless of precisely how the conflict might affect the case, it is there, and in my view makes Nabcor's representation of the broker-class undesirable. See Carroll v. American Federation of Musicians, 372 F.2d 155, 162 (2d Cir. 1967), vacated on other grounds, 391 U.S. 99 (1968); 3B J. Moore, Federal Practice ¶ 23.07[3] (2d ed. 1969).

One final point to be dealt with regarding the adequacy of Nabcor's representation is Nabcor's financial condition. In 1971 Nabcor sold stock and debentures for net proceeds of $240,000. The offering circular dated April 29, 1971 stated that $50,000 of the proceeds would be used for the antitrust litigation. The offering circular stated that Nabcor might not be able to obtain all the funds necessary to prosecute the litigation.

At a hearing on February 26, 1974 I questioned the attorney for Nabcor about Nabcor's ability to carry on a class action. He stated that Nabcor has proved its ability to conduct this litigation by doing so for over three years. In any event, according to Nabcor's attorney, Nabcor was not really having to support the litigation except to a limited degree, because there is a contingent arrangement for the attorney's fee, and the only legal expenses which Nabcor is paying on a current basis are disbursements, which have amounted to about $4,000 - $5,000.

There are several weaknesses in this argument. In the first place, Nabcor's record thus far in pursuing the action is not conclusive as to its ability to handle a class action, because the class action aspects of the litigation have not really begun.

More important, the statement about limited disbursements of $4,000 - $5,000 is apparently incorrect. Nabcor's financial statement for the nine months ending October 31, 1971 stated that $20,600 had been spent on the present antitrust case. The record does not show what was spent between November 1, 1971 and January 31, 1972. Nabcor's statement for the six months from February 1, 1972 to July 31, 1972 showed that $9,390 was spent on the antitrust case and another action. A financial report prepared by defendants' accountants for the period August 1, 1972 to March 8, 1973 showed $7,600 for legal and accounting expenses.

The total of these figures is about $37,600. According to these reports Nabcor has spent far in excess of $4,000 - $5,000 on the antitrust litigation.

The record also shows that Nabcor has been in weak financial condition for well over two years. For the nine months ending October 31, 1971 Nabcor had an operating loss of $82,000 on sales of $221,000 -- and a total loss, after extraordinary items, of $183,651. For the six months ending July 31, 1972 Nabcor had an operating loss of $87,000 and a total loss of $96,000 on sales of $216,000. As of July 31, 1972 Nabcor had a negative working capital balance of $212,000. As of March 8, 1973 Nabcor had a negative cash balance of $1,472.

Nabcor has not provided current figures. However, the record shows that a judgment for $150,000 was entered against Nabcor in December 1972 in an Ohio state court on a defaulted promissory note. This judgment came to light when certain defendants were served in November 1973 with an order of attachment issued by the Supreme Court, New York County.

Under all the circumstances I conclude that Nabcor and its attorney should not be permitted to represent any parties in this action beyond the plaintiffs who are now named in the complaint.

Conclusion

The motions of the auto manufacturer defendants for summary judgment are granted to the following extent:

(1) Counts 21, 22, 23 and 27 are dismissed in their entirety.

(2) Counts 18-20 are dismissed, except as to the transshipment claim of Nabcor.

(3) Counts 14-17, 24-26 are dismissed as to plaintiffs Courtesy Auto Brokers, Heim, Jamele and Young.

Except as thus granted, the motions for summary judgment are denied.

Plaintiffs' motion to represent the class of Nabcor broker-franchisees is denied.

So ordered.

Dated: New York, New York
April 5, 1974

THOMAS P. GRIESA
U.S.D.J.

Interrogatories

1. State separately and in detail the factual basis for the averments of paragraphs 111(A) and 112(A)(hhh) of the complaint insofar as they relate to NYT, and, separately with respect to each such paragraph:

(a) identify the defendants or co-conspirators with whom NYT unlawfully combined or conspired;

(b) to the extent plaintiffs are unable to identify particular defendants or alleged co-conspirators with whom NYT unlawfully combined or conspired, identify the category (as set forth in paragraphs 17-90 of the complaint) of such defendants or co-conspirators with whom plaintiffs contend NYT combined or conspired;

(c) identify each officer, employee or agent of NYT who participated in such combination or conspiracy;

(d) identify the person or persons who on behalf of other defendants or co-conspirators combined or conspired with NYT;

(e) identify in accordance with paragraphs 3(c) and 3(d) of the definition section hereof each communication which occurred in connection with the alleged combining and conspiracy which involved or related to NYT, specifying whether the communication was oral or written or both oral and written and identifying any documents, and identify each person involved in, connected with or present at such communication;

(f) identify in accordance with paragraphs 3(c) and 3(d) of the definition section hereof any agreement, relating to or resulting from any alleged combining or conspiracy to which NYT was a party or which relates to NYT, specifying whether the agreement was oral or written or both oral and written and identifying any documents, and identify the persons participating in or present at the negotiation and execution of the agreement and the date and place of the negotiation and execution of the agreement;

(g) if there was no agreement among the defendants or with any co-conspirators, set forth in detail all of the facts from which plaintiffs contend that NYT combined and conspired with others;

(h) describe in detail each act, meeting, occurrence, transaction or other things done, not done, or attempted to be done (specifying the date thereof and identifying the persons participating or involved therein or connected therewith directly or indirectly) which plaintiffs contend was part of or constituted, combining or conspiring by NYT;

(j) Identify each advertisement which it claimed in paragraph 112(A)(hhh) of the complaint was accepted by NYT, and with respect to each such advertisement, state:

(i) the date on which the advertisement was placed and the date on which it was run;

(ii) the nature of the advertisement, i.e., franchise offering, new or used car sales, help wanted, etc.;

(iii) the identity of the advertiser;

(iv) whether Nabcor or any other plaintiff or any Nabcor franchisee was identified in the advertisement or in the application (either oral or written) with respect to the advertisement;

(v) the circumstances surrounding the placement of the advertisement, including all meetings, communications or contacts between Nabcor or any other plaintiff or Nabcor franchisee or any of their representatives and NYT, the identity of all persons involved, the date and place of such meetings, communications or contacts, whether such communications or contacts were oral or written or both, and identify such communications and contacts, including documents (which should include the advertisements) in accordance with paragraphs 3(c) and 3(d) of the definition section thereof; and

(j) Describe separately and in detail each other fact or communication, including hearsay, upon which the averments of paragraphs 111(A) and 112(A)(hhh) of the complaint are based insofar as they relate to NYT, identifying all persons included therein or present thereat and all communications, including documents in accordance with paragraph 3 of the definition section thereof.

2. State whether plaintiffs contend that NYT combined or conspired or agreed or reached any understanding, whether explicit or implicit, with any other defendant or co-conspirator or any other person to do any of the acts described in the four subparagraphs of paragraph 111(B)(3) of the complaint, and if the answer to this interrogatory is in the affirmative, separately, with respect to each of such subparagraphs insofar as they relate to NYT:

(a) identify the parties to such combination, conspiracy, agreement or understanding;

(b) identify the persons who participated in the combination or conspiracy or reached such agreement or understanding on behalf of NYT and on behalf of all other parties thereto;

(c) state whether such agreement or understanding was oral or in writing, and identify such agreement in accordance with paragraphs 3(c) and 3(d) of the definition section hereof, including the identification of any documents;

(d) specify the date or dates of any meeting, communication or contacts in connection with such combination, conspiracy, agreement or understanding, identifying each person who participated in any such meeting or was present thereat and the location thereof and identifying any oral or written communications and documents in accordance with paragraphs 3(c) and 3(d) of the definition section hereof.

3. State in detail the factual basis for the averments of paragraph 111(B)(3)(a) of the complaint insofar as they relate to NYT, and:

(a) identify each Nabcor franchisee whose advertising was refused or the continued acceptance of which was refused, and with respect to Nabcor and each such franchisee, state:

(i) whether it is contended that all advertising was refused, or whether it is contended that advertising was initially accepted but the continued acceptance of advertising was refused;

(ii) with respect to advertising, the continued acceptance of which was refused, specify the nature and circumstances of the advertising that was accepted by providing the information requested in subparagraphs (i)-(v) of paragraph 1(i) hereof. If such information is already provided under those subparagraphs it will be sufficient to so state this and identify the advertising in question;

(iii) with respect to advertising, the continued acceptance of which was refused, state whether it is contended that in rejecting advertisements, NYT knew that it had previously accepted advertisements from the advertiser and whether it is contended that the refusal to continue to accept advertisements represented any change in policy or practice on the part of NYT with respect to the advertiser in question, and if so whether such change in policy or practice was related to the alleged combination or conspiracy. If the answers to any of the interrogatories in this subsection are in the affirmative, state in detail the factual basis for such answers and identify any documents and communications, with respect thereto in accordance with paragraphs 3(c) and 3(d) of the definition section hereof;

(iv) with respect to advertising which was refused (including instances where advertising had previously been accepted as well as instances where all advertising had been refused), specify:

(a) the date on which the advertisements were sought to be placed and the date on which placement of the advertisements were refused;

(b) the nature of the advertisements, i.e., franchise offering, new or used car sales, help wanted, etc.,

(c) the identity of the advertiser;

(d) whether Nabcor or any other plaintiff or Nabcor franchisee was identified in the proposed advertisement or in the application (either oral or written) with respect to the advertisement; and

(c) the circumstances surrounding the submission of the advertisement and the refusal of the advertisement, including all meetings, communications or contacts between Nabcor or any other plaintiff or Nabcor franchisee or their representatives and NYT, the identity of the persons involved, the date and place of such meetings, communications or contacts, whether such communications or contacts were oral or written or both, and identify such communications and contacts, including documents (which should include any proposed advertisements) in accordance with paragraphs 3(c) and 3(d) of the definition section hereof;

(b) describe separately and in detail each other fact or communication, including hearsay, upon which the averments of paragraph 111(b)(3)(a) are based insofar as they relate to NYT, identifying all persons involved therein or present thereat and all communications, including documents, in accordance with paragraph 3 of the definition section hereof.

4. State in detail the factual basis for the averments of paragraphs 111(B)(3)(b) and 111(B)(3)(c) of the complaint insofar as they relate to NYT, and:

Plaintiffs reque

production

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

NATIONAL AUTO BROKERS CORP., et al., : 70 Civ. 5421A (TPG)

Plaintiffs, : REQUEST FOR DOCUMENT PRODUCTION

-against- :

GENERAL MOTORS CORPORATION, et al., :

Defendants. :

- -x

Plaintiffs, pursuant to Rule 34 and Rule 56(f) of the Federal Rules of Civil Procedure, demand that defendants

FIRST NATIONAL CITY BANK ("Citibank"),
GENERAL MOTORS CORPORATION ("GM"),
GENERAL MOTORS ACCEPTANCE CORPORATION ("GMAC"),
FORD MOTOR COMPANY ("Ford"),
CHRYSLER CORPORATION ("Chrysler"),
AMERICAN MOTORS CORPORATION ("AMC"),
THE BETTER BUSINESS BUREAU OF METROPOLITAN NEW YORK, INC.
("New York BBB"),
BETTER BUSINESS BUREAU OF WESTCHESTER COUNTY ("Westchester BBB") and
THE NATIONAL BETTER BUSINESS BUREAU, now known as
THE COUNCIL OF BETTER BUSINESS BUREAUS, INC. ("National BBB")

produce for inspection and copying each document described in part "I", "II" or "III" of the schedule attached hereto at the offices of Carl E. Person, Room 424, 132 Nassau Street, New York, New York on July 23, 1974 at 10:00 o'clock A.M.

This request for production of documents is continuing. If at any time after production of documents, and prior to the trial of this action, any defendant obtains additional documents responsive to this request, it shall within thirty days, and in no event later than five days before trial, produce any such additional documents.

Dated: New York, New York,
June 21, 1974

Carl E Person
Carl E. Person

Attorney for Plaintiffs
132 Nassau Street
New York, New York 10038

(212) 349-4616

SCHEDULE OF DOCUMENTS

TO BE PRODUCED BY DEFENDANTS

A. Definitions

1. As used herein, the term "document" includes the original and any copy (regardless of origin) and all drafts of correspondence, memoranda, reports, financial reports, notes, letters, telegrams, messages (including reports, notes and memoranda of telephone conversations and conferences), studies (including market studies), analyses, comparisons, books, magazines, newspapers, booklets, circulars, bulletins, notices, instructions, minutes and other communications, including inter- and intra-office communications, purchase orders, invoices, questionnaires and surveys, charges, graphs, photographs, phonographs or other recordings and other data compilations from which information can be obtained (translated, if necessary) by plaintiffs through detection devices into usable form), and any other communication or record of any sort whatsoever.

2. As used herein, the term "deposit" includes any checking accounts, other demand deposits, certificates of deposit, interest-bearing account, non-interest bearning account, note, commercial paper or other security of any kind issued by Citibank or any subsidiaries or other affiliates whether or paying interest

3. As used herein, the term "compensating balance" excludes any deposit with Citibank which by its own terms is the whole transaction with Citibank and therefore has no connection with any other transaction between Citibank and the owner or beneficiary of the deposit but includes any deposit with Citibank or any subsidiary or affiliate in which a gross profit accrues to Citibank or any subsidiary or affiliate which gross profit is credited to some other transaction between Citibank (or subsidiary or affiliate) and the owner or beneficiary of the deposit.

B. Time Period

This request for production of documents relates to the period of time commencing January 1, 1962 to the present date.

C. Documents To Be Produced By Defendants

All documents (other than routine deposit slips, receipts, checks, statements, advices, notes or other securities) in the possession or under the control of the defendant producing documents hereunder or any subsidiary thereof, as follows:

I. TO BE PRODUCED BY CITIBANK:

1. Documents evidencing or relating to the selection or appointment to Citibank's Board of Directors or any advisory board of Citibank each person who was at the time of his appointment an officer, director, employee, agent or attorney of a new-car dealer franchised by GM, Ford, Chrysler or AMC;

2. Documents evidencing or relating to communications between Citibank and GM, GMAC, Ford, Chrysler, AMC or any subsidiary thereof concerning the amount on deposit by any thereof with Citibank or the number of new automobiles manufactured by GM, Ford, Chrysler or AMC financed by Citibank;

3. Documents evidencing or relating to any compensating balances maintained by GM, GMAC, Ford, Chrysler, AMC or any subsidiaries thereof with Citibank;

4. Documents evidencing or relating to the grant, extension, modification or withdrawal of any line of credit of GM, GMAC, Ford, Chrysler, AMC or any subsidiaries thereof with Citibank;

5. Documents evidencing or relating to the analysis, value or profitability of any business of GM, GMAC, Ford, Chrysler, AMC or any subsidiaries thereof with Citibank, including any deposits maintained by GM, GMAC, Ford, Chrysler, AMC or any subsidiaries thereof with Citibank;

6. Documents evidencing or relating to the profitability to Citibank of consumer auto loans, direct consumer auto loans or indirect consumer auto loans;

7. Documents evidencing or relating to the profitability to Citibank of floor-plan financing by Citibank of dealers franchised by GM, Ford, Chrysler or AMC;

8. Documents evidencing or relating to any relationship of GM, GMAC, Ford, Chrysler, AMC or any subsidiaries thereof with Citibank concerning Citibank's consumer auto loan business or Citibank's dealer floor-planning business;

9. Documents evidencing or relating to the cost of money to Citibank;

10. Documents evidencing or relating to the amount of compensating balances maintained by any persons with Citibank as compensation in whole or in part for lines of credit with Citibank or any borrowing from Citibank under such lines of credit;

11. Documents evidencing or relating to the profitability to Citibank of extension of lines of credit in transactions involving compensating balances;

12. Documents evidencing or relating to the selection, designation or appointment of any officer, director, employee, agent or attorney of Citibank to the Board of Directors or any advisory board of the New York BBB, Westchester BBB or the National BBB;

13. Documents evidencing or relating to any communications between Citibank and any Citibank officer, director, employee, agent or attorney while serving as a member of the Board of Directors or any advisory board of the New York BBB, Westchester BBB or National BBB concerning matters involving the New York BBB, Westchester BBB or National BBB;

14. Documents evidencing or relating to any communications between Citibank and the New York BBB, Westchester BBB or National BBB;

15. Minutes of any meetings of the Board of Directors or any advisory board of the New York BBB, Westchester BBB or National BBB; and

16. Documents evidencing or relating to any instructions, rules, procedures or suggestions by Citibank to any of its officers, directors, employees, agents or attorneys who have been, or may be, appointed to the Board of Directors or any advisory board of the New York BBB, Westchester BBB or National BBB.

II. TO BE PRODUCED BY GM, GMAC, FORD, CHRYSLER AND AMC:

The documents described in paragraphs 1, 2, 3, 4, 5, 6, 7 and 8 under part "I" above.

III. TO BE PRODUCED BY NEW YORK BBB, WESTCHESTER BBB AND NATIONAL BBB:

The documents described in paragraphs 12, 13, 14, 15 and 16 under part "I" above.

GM's Notice of Deposition

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---x

NATIONAL AUTO BROKERS CORP., et al., :
Plaintiffs, :
-against- : 70 Civ. 5421A (TPG)
GENERAL MOTORS CORPORATION, et al., : NOTICE OF DEPOSITION
Defendants. :

---x

PLEASE TAKE NOTICE that, pursuant to Rules 30, 34, and 45 of the Federal Rules of Civil Procedure, the undersigned shall take the depositions upon oral examination of the parties and witnesses described on Schedule A hereto at the times and places listed thereon before officers duly authorized to administer oaths.

PLEASE TAKE FURTHER NOTICE that, pursuant to Rules 30, 34, and 45 of the Federal Rules of Civil Procedure, subpoenas duces tecum are to be served upon the witnesses described on Schedule B hereto requiring production of the materials described in said schedule.

Dated: New York, New York
July 11, 1974

PAUL, WEISS, RIFKIND, WHARTON & GARRISON

By Lewis A. Kaplan
Lewis A. Kaplan
Attorneys for Defendants
General Motors Corporation, General Motors Acceptance Corporation, Frederic G. Donner and James M. Roche
345 Park Avenue
New York, New York 10022
(212) 935-8000

SCHEDULE A

Depositions to be held
at the offices of
Paul, Weiss, Rifkind, Wharton & Garrison
345 Park Avenue, New York, New York

Name of Witness	Date and Time
Alan Dennison last known address: Two Ralph Road New Rochelle, New York	August 22, 1974 10:00 a.m.
Salvatore C. Cuccia 95 Fowler Avenue Yonkers, New York	August 20, 1974 10:00 a.m.
National Auto Brokers Corp. By: Michael O'Brien 101 Marple Woods Drive Springfield, Pennsylvania	August 14, 1974 10:00 a.m.

Depositions to be held
at the offices of
Hodgson, Russ, Andrews, Woods & Goodyear
1800 One M & T Plaza, Buffalo, New York

Name of Witness	Date and Time
Donald A. Bolling last known address: 4 Rod Road Marilla, New York	August 28, 1974 10:00 a.m.
Gary Kuhaneck last known address: 62 Park Forest Drive Williamsville, New York	August 29, 1974 10:00 a.m.

Depositions to be held
at the offices of
Schnader, Harrison, Segal & Lewis
1719 Packard Building
Philadelphia, Pennsylvania

Name of Witness	Date and Time
William Nash last known address: 796 Bob White Lane Huntingdon Valley, Pennsylvania	September 9, 1974 10:00 a.m.
John Snyder, a/k/a Jack Snyder 8359 Langdon Street Philadelphia, Pennsylvania	September 10, 1974 2:00 p.m.

THE COURT: I thought we would have a meeting today. I got a communication from Mr. Person asking about taking depositions by using a tape recorder, and I thought it would be a good idea to discuss that, as well as discovery problems in general.

In the meantime, this morning I was trying to look through the transcripts and I could not find, and I suppose it is in the file, but somehow I was unable to locate the transcript of the meeting where we dismissed a number of the Robinson, Patman Act claims. Does anybody have that and tell me the date?

MR. KAPLAN: I believe it is either April 12th or 19th, your Honor.

THE COURT: I have an April 12th transcript, 11.15 a.m. It is a 27-page transcript and it doesn't seem to have that in it.

Then I have an April 29th transcript which is entirely devoted to discovery.

MR. KAPLAN: Then it would be April 19th. We can provide you with a copy.

THE COURT: So we had meetings the 12th, 19th and the 29th. Does anybody by any chance have a list of the claims we struck out on the 19th?

MR. KAPLAN: I don't happen to have a list --

THE COURT: That is not crucial. All right. Can anybody give me a report on the current discovery status?

MR. PERSON: Your Honor, most of the defendants have responded with the documents called for by your prior order. I believe that Luby Chevrolet has not responded. I may be wrong, but I think they have not presently responded yet. I will have to communicate with counsel. But other than that, the initial wave of document production has been concluded, practically speaking.

THE COURT: You say initial wave. Do you want anything else?

MR. PERSON: Yes, your Honor. I presented in a memo I guess dated early in April the documents that I'd like to have produced and you ordered that we would do it by waive. What I'd like to do is to go into the areas of the warranty, destination charge, and the fleet certificate. I think those are very crucial areas in the case.

THE COURT: Those are the three remaining areas you want to cover in additional document requests?

MR. PERSON: I don't have the memorandum with me --

THE COURT: I have it.

MR.PERSON: I would like to cover everything which hasn't been covered to date,which is substantial. I thought the third waive could be relating to the Robinson-Patman claims because they would be less important, I think.

THE COURT: But the things you have immediately on your mind are what?

MR. PERSON: The warranty programs of the manufacturers, the destination charge programs and the fleet certificate programs, or the fleet programs.

THE COURT: What documents do you need on the warranty programs?

MR. PERSON: I would like all of the document --

THE COURT: You don't have your memorandum with you?

MR. PERSON: I don't, your Honor, no. I was preparing a draft of what it is in detail that I'd like to give them in effect a checklist of what to look into,such as minutes orany analyses or any rulings and policies, and so forth. I would like to submit that. I can do that on Monday.

THE COURT: This is really the last meeting that I think I am going to have time for before the fall and I think we ought to use this meeting to get the discovery initially lined up. I can't have another meeting next week. Maybe it's taken you by surprise, but I would think you would have your material so that you can say what documents you need.

I have a copy of this memorandum and I am sure the defendants have copies. Maybe you could borrow one.

MR. PERSON: I didn't realize you would be going into it, but I would like the remaining documents that are described on that memorandum. We only had one takedown from the memorandum. I'd like to have the rest of it, if at all possible.

As I understand it, basically what we covered the last time in the way of documents is really the most germane group of documents in the case, and that is any documents talking about NABCOR and the plaintiffs. If you get beyond that, get into a lot of general materials, that is something else again.

MR. PERSON: That we need in order to establish the liability, and I think we have some per se violations here --

THE COURT: What per se violations?

MR. PERSON: In terms of the warranty violation programs --

THE COURT: What is the per se violation under the warranty program?

MR. PERSON: It is a method of creating a territorial exclusive, so that the factory --

THE COURT: What count in the complaint are you talking about? Because we have stricken out, as I recall it,count 16 is out --

MR. PERSON: This is the Sherman Act count.

THE COURT: What count is that?

MR. PERSON: Counts 5 through 7. And we have the destination limited to the trans-shipment theory, and that is in counts 18 through 20.

THE COURT: I didn't dismiss counts 5 through 7?

MR. KAPLAN: No,your Honor. Counts 5 through 7 don't allege anything like what we are talking about. They allege that the four manufacturers conspired among themselves to refuse to provide warranty servicing to NABCOR and its customers.

THE COURT: I dismissed count 16, if I remember, because that count alleged that at least some of the auto manufacturers, I don't remember which were defendants in that, but at least some of them refused to permit NABCOR to establish a warranty service program so NABCOR could make the profit out of it by doing warranty service. And there were lots of admissions that NABCOR never intended to perform any service of any kind and there was a little discussion which was on the record and that, I struck that plane.

Then I guess I didn't get to count 5. Count 5 is something a little different,right?

MR. KAPLAN: The difference lays in the fact that count 16 was brought under the Robinson-Patman Act, didn't require any showing of collusion among the manufacturers, whereas Counts 5 through 7 allege a conspiracy under the Sherman Act among the four automobile manufacturers with respect to denial of the program.

THE COURT: And conspiracy to do what?

MR. PERSON: The problem is this, your Honor; under the warranty that some of the dealers refused to honor the manufacturers' obligation by contract in law to perform warranty work on automobiles manufactured by them.

THE COURT: There are two potential types of claims, it seems to me. One is a claim of the kind we talked about in Count 16 or connected with Count 16 a minute ago, a claim that the auto manufacturers refused to let NABCOR set up its own warranty servicing program so that it could do warranty servicing. Then another type of claim would be the claim that the auto manufacturers and others considered to refuse to have regular franchised dealers do warranty work on NABCOR cars.

MR. PERSON: And even without conspiracy program of each individual manufacturer operated so as to --

THE COURT: Okay. But the two types of alleged injury. What are you alleging in counts 5 through 7, the first or the second?

MR. PERSON: Not -- well, to the extent that we were refused the opportunity to set up our own warranty, that is part of it. But the real problem is the inability of customers to get warranty work through the franchise system. And as a result of that NABCOR lost customers.

THE COURT: Well, now, look. As far as any claim that, and I see it in paragraph 116(a) of count 5, if you are talking about not making a warranty program or related warranty payments available to NABCOR with which NABCOR can satisfy the warranty claims of its customers.

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To the extent that Counts 5 through 7 allege that the defendants refused to permit NABCOR and its franchisees to do warranty repair work and make a warranty program of that nature available to us, I don't see any basis for such claim in light of your own admissions and I see no basis for having lots of discovery on it.

MR. PERSON: We haven't made those admissions, your Honor. Those are based upon statements that -- you looked through a compilation prepared which was incomplete and we haven't had a chance to give to you --

THE COURT: Let's not hash that over again. That is in your own draft. You drafted the complaint and the complaint starts out with this long narrative saying you never intended to set up repair work, you never intended to do it. The whole idea was to have the kind of operation where it didn't even require the setup to do this work.

I may be wrong, but I am not going to rehash that, and I am going to consider that any such claim is stricken from the complaint. To the extent that -- and we can go into this in finer detail in another meeting when we have those minutes here that I seem to be missing -- but just for the purposes of outlining discovery I see no reason to have discovery about that kind of a claim.

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The other phase of the warranty claim, that is, that the auto manufacturers conspired or they independently caused franchise dealers to refuse work on a car or on cars that were sold by NABCOR or through NABCOR, that is a different kind of a claim. On that, it would seem to me that any documents about that kind of a claim would be pretty well directed to NABCOR or the plaintiffs. I wouldn't imagine that there would be vast general programs -- I wouldn't expect that documents about general programs would have much bearing.

I would think that the general warranty programs could be stipulated, what they do and don't do. I don't imagine there is much dispute about it, and to get a lot of documents outlining the general warranty programs of General Motors and the others would be wasting our time. And it seems to me tht what you need here, if you are going to try to prove or anybody is trying to prove anything in this case on the question of whether the defendants set out to cut NABCOR or the plaintiffs or the buyers of their cars off from warranty work, the documents relating to that would pretty much be specific.

MR. PERSON: Your Honor, may I just add a comment at this point, and that is that any cars that are purchased outside of a dealer's territory probably had the

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same denial of warranty coverage, which goes to enforce the territory exclusive. If they were caught in the general tendency of the manufacturers to allow a dealer to refuse warranty work for automobiles purchased outside of that territory, we'd like to have those documents to show that we were falling within a general --

THE COURT: That is a different kind of a claim. I thought we were talking about the kind of claim you said was at least part of Counts 5 through 7, that is essentially a boycott claim, a claim to specifically boycott cars sold through NABCOR and the manufacturers and prevent the owners of those cars from coming in to a franchise dealer and getting service.

MR. PERSON: And the warranties themselves provided territorial limitations --

THE COURT: That is a different kind of a claim. That is a claim that could affect -- it wouldn't be directed at NABCOR and its cars --

MR. PERSON: That is why we need documents --

THE COURT: Please. Can't we just take it one thing at a time. We will come to that a little later, the territorial problem.

You allege that as a general problem affecting other people besides NABCOR, right?

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MR. PERSON: Yes.

THE COURT: Let us talk about the specific denial of warranty service to NABCOR's car. What kind of documents do you need on that in addition to simply documents talking about NABCOR?

MR. PERSON: I agree with you. In that limitation I would hope that they had produced all that they had.

THE COURT: So you don't need any more documents.

What count in the complaint talks about the general problem of territorial limitations on warranty work? What count in the complaint is that?

MR. PERSON: Your Honor, Counts 1 through 3 and 5 through 7 would be applicable.

THE COURT: I don't understand how Counts 1 through 3 and 5 through 7 would really allege -- just refresh my memory.

Where in those counts is it alleged that there was an illegal or territorial limitation of warranty work?

MR. PERSON: I have alleged a policy of illegal territorial enforcement. That is enforcement illegally of a territorial exclusive. I can show all that.

THE COURT: Do you have the complaint?

(Pause.)

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MR. KLEINBARD: While Mr. Person is looking I can advise the Court that it is our position that that general takc is not alleged in the Counts 5 through 7, which are boycott counts. I do not think there is a general territorial problem alleged in those counts.

MR. PERSON: Your Honor, warranty claims, page 27-H is in the first count.

(Pause.)

THE COURT: You have referred me to Count 1 of Subparagraph H of Paragraph 111-B(1). This occurs on page 267. The allegation is that there was an unlawful combination or conspiracy consisting of an agreement and concert of action among the conspirator defendant and co-conspirators, the terms and objects of which have included, then we go over to page 27, Subdivision L agreeing amongst themselves not to provide adequate automobile repair service and not to honor warranty claims of owners who purchased their automobiles through the NABCOR system, to create dissatisfaction among NABCOR customers and to destroy the business and reputation of NABCOR and its franchisees.

We come down to something else, Subdivision D of another Subdivision 2, at the bottom of page 27 which alleges that there is wilful participation by General

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Motors and Ford by having a sales owner district. I don't th ink that has anything to do with it.

MR. PERSON: I'll find it. Let me look for it. I am sure I have it in there.

THE COURT: Anybody at all know where such an allegation is?

MR. KAPLAN: There is no such allegation, your Honor.

THE COURT: From what I just read there is certainly no such allegation.

(Pause.)

THE COURT: Let us pass that. I am going to assume there isn't any such allegation unless you come back. It is a limited kind of claim and we can cover it later.

What about the destination charge claim?

MR. PERSON: That was limited by you to the transshipment theory and we would like to show that first of all, there is a mandatory destination charge so that somebody can bypass it by going to the factory to pick up a car.

No. 2, that the destination charge involves elements of phantom freight, which means that there would be an overcharge to certain people who bought cars by tacking on as part of the destination charge an amount

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for which there wasn't a real expense by the factory for shipment. And that thre was an adjustment of charges which in effect reduced the true freight to people in outlying areas and increased freight from actual costs to people in the areas closer to the plants, thereby reducing the difference in costs between the two distances and making it less profitable to move cars from one district to another.

THE COURT: I granted the motion to dismiss as to -- was it Counts 18 to 20?

MR. KAPLAN: As to plaintiffs' other than NABCOR and as to the claim that NABCOR paid overcharges, but not to the extent that Mr. Person has just outlined.

3 THE COURT: It was left in -- your motion was limited on that.

MR. KAPLAN: That is correct, your Honor.

THE COURT: And you agreed in effect to leave in what we called the transshipment claim.

MR. KAPLAN: For the time being.

THE COURT: What is the transshipment claim?

MR. KAPLAN: That is Mr. Person's that the manufacturers conspired among themselves to set up a system for charging the freight on the delivery of new automobiles to franchised automobile dealers, the effect of which was

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to make it economically unattractive for persons such as NABCOR, located near factories, to buy near factories and to ship to outlying areas and to realize economies on the shipments by their own means.

THE COURT: In other words, the claim would be that the fellow living across from the factory, he can't economize by going back and picking up because there is a mandatory destination charge of some kind, right?

MR. KAPLAN: That's correct.

THE COURT: He also mentioned the phantom freight claim. I guess that claim would be, let's suppose you were a fellow out in Los Angeles and you didn't even attempt to go to the factory and pick up, you just ordered the car delivered to Los Angeles; Mr. Person's claim, as I understand it, is that there would be things billed that would be called freight charges which really weren't freight charges because they were way in excess of any legitimate cost of freight; is that right?

MR. PERSON: There would be charges which were built in which did not reflect actual expenses so that some customers were paying more for freight than they should have, and that occurred, I think basically closer to the plant, whereas outlying areas paid less than actual cost. And it was made up for by overcharges nearer the plant.

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By decreasing the outlying areas and increasing the destination charge for nearby areas, there was a reduction in the difference in price, so that people could not move cars as readily.

It further supported the territorial exclusives they were trying to give the local dealers.

MR. KAPLAN: Your Honor, may I say that to the extent this claim involves this phantom freight charge, that much of it is now immaterial because of the Robinson-Patman dismissal of Count 21. The essence of this claim as we understand it is the claim that the manufacturers conspired among themselves, Ford, Chrysler, General Motors, and American Motors, to set up a system which for whatever reason operated to prevent people such as NABCOR from transshipping economically and thereby competing at favorable terms with outlying dealers. That is the claim as we understand it.

It's been limited only to NABCOR and only to that extent. As I see that the phantom freight thing is gone.

MR. PERSON: We add monopoly and we say people unknown. One manufacturer can be monopolistic using this trick.

THE COURT: I am trying to get some idea of the

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nature of the claim so we can talk about the documents. I think that everybody agrees that at least one and perhaps the main component of that claim is the claim that people living or people having their businesses fairly near Detroit, or wherever the cars are manufactured, they are really deprived of the opportunity to economize by picking up the car, or even if they don't want to pick up the car, the freight that they have to incur by having it delivered is excessive in proportion to the distance and actual cost of the freight.

What documents do you think you need in addition to what you have already been permitted to get?

MR. PERSON: We have received nothing in the area of destination charges other than amounts shown on individual invoices. We'd like to go back and see how these charges are established. Back in 1953 or '4 there was a change by all manufacturers about at the same time from which they changed from the optional system of true freight into this new system that they have.

THE COURT: You want to have documents about the policies lying behind the establishment of freight charges?

MR. PERSON: Right, and the method of calculation so that we can show where the phantom freight exists.

THE COURT: How about that?

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MR. KAPLAN: Your Honor, I think that without going into a gigantic fishing expedition, which it certainly would be to explain how these charges were arrived at. There is a fundamental objection to this. The remaining plaintiff who makes this claim probably lacks standing as to raise this claim at all. NABCOR's plan method of operation never involved the possibility that they were to transship cars from one destination charge zone to another. We have the means to explore that by whatever means your Honor deems appropriate.

THE COURT: What I start with at this point, Mr. Kaplan, is, you have got a claim that still indicates you didn't move to dismiss it and it is not now dismissed, and I certainly wouldn't today undertake to get into a -- I don't feel anybody is clear enough to get into a discussion leading to a dismissal of that claim. So we have got to figure out a way to get discovery. It seems to me that ehat Mr. Person outlined doesn't sound unreasonable. It seems to me what he wants is two things:

One, the kind of policy documents outlining the reasons for his present system and the reasons for any change that led into the present system. The last change, so to speak. He dates it. I wouldn't think that is very tough.

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Then he would like documents showing the method of calculation. I also wouldn't think that would be very hard. So I would tend to let him have those and if it turns out that they have no standing and turns out that they have standing at the present moment because they are still in the complaint.

MR. PERSON: Also the competitive effect of that --

THE COURT: I don't understand that.

MR. PERSON: Any analysis of how it would affect

THE COURT: You used the word policy kind of documents to differentiate between invoices and shipping tickets and all. You tried to do that. Let's not have any more.

MR. KAPLAN: We will consult with our client and see what can be done.

THE COURT: We will grant that request for now. We are down to fleet certificates. And that direction as far as the destination charge documents go is to all the auto manufacturers.

Let's cover fleet certificates.

MR. PERSON: We'd like to have the documents which --

THE COURT: Are you making a claim about destin-

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ation?

MR. PERSON: Yes, your Honor, we are, against all four.

THE COURT: All right. We will leave it at that.

What about fleet certificates?

MR. PERSON: We'd like to have the documents which once again evidence what the program is from the beginning up to the present with all changes for each manufacturer so that we can see ourselves where the changes are made and what the effect is. We would like to know what the -- at every step along the line during the period covered --

THE COURT: What do you mean by every step?

MR. PERSON: From 1966 through the present, or if you want to cut it at some earlier point.

THE COURT: Again, the policy-type documents for fleet certificates from '66 on; is that right?

MR. PERSON: Not just a representative one from whatever they choose, but each change along the way.

THE COURT: I mean all. You're asking for what?

MR. PERSON: Yes, your Honor.

THE COURT: What about that?

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MR. KLEINBARD: When that matter last came up for discussion, my recollection is there were three items left on of which this was one. You may recall Mr. Piel was here at the time and he wanted to address himself to the subject of fleet program. Mr. Piel of Sullivan & Cromwell representing Ford. And time didn't permit us to do that at that particular session.

THE COURT: That was the session on the 19th of April?

MR. KLEINBARD: I believe so, your Honor. I didn't attend that session but that is what I believe happened. We were advised today, perhaps erroneously, and I am sure inadvertently, that we were going to discuss the tape recording problem and where discovery was, but before we embark on a general exploration of documents with respect to the fleet program going back to 1966, we would at least like to have the opportunity to go back and address ourselves to that, either orally or by memorandum, whichever your Honor sees fit.

4 We are quite frankly not ready today. Mr. Pugh would have been here if we were going to have a discussion of this aspect, because he is particularly expert in it, and we would have similarly been prepared to discuss that problem. So I would ask your Honor to

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give us either an opportunity to do it at a later date orally or to do it on the most limited number of papers that we possibly can so that we can set forth the nature of the fleet program and hopefully dispose of it.

Your Honor was undecided as to whether this question should remain in the case or not, and, of course, if it is not to remain in the case it is idle to have all this discovery. We'd like to have the opportunity to persuade you to eliminate it from the case and I don't think anybody is prepared to do that today. We will be prepared to do it any time you say we should, but we'd like to have some reasonable notice.

MR. PERSON: We can have document production in this area and it would be sufficient to a motion for summary judgment on the product liability, by the plaintiffs

THE COURT: I am really a little lost because I don't have those April 19th minutes. My recollection is vague, but I do have in mind what I recall as some serious problems as far as the plaintiffs' case in basic on fleet certificates. We went through this at considerable length in the Colonial Cadillac preliminary injunction motion. We had witnesses on the stand explaining at least as far as General Motors is concerned pretty thoroughly about fleet certificates; they were cross-els examined, and so forth.

I don't mean to indicate that you are finally cut off on fleet certificate argument, but all I do recall is that despite your very heavy emphasis I got the impression it was a matter of some difficulty as far as your case.

MR. PERSON: You know we haven't had discovery yet in this area. I had requested it prior to the preliminary injunction motion and that request was denied. I merely took whatever witness was offered and tried to do something with it.

THE COURT: That always sounds good, but in this case it isn't. I watched this witness or those witnesses and they were talking about things that as far as fleet certificates, what happens on fleet certificates and who gets them and what happens to the auto dealers' quotas and the effect of the fleet certificates, and so forth, I really didn't think that you did anything to show that they were lying; and I don't think you would have done much or any better if you'd have had bushels and bushels of discovery. I don't think on that point there is much utility in talking about not having discovery.

I am in a little bit of a dilemma... If we are going to have any chance of getting the action tried this

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fall, whether it is early fall or late fall, and I guess it is going to be late fall if anything, we can't have big blocks of document discovery hanging over until the fall. And yet I don't quite know what to do with the fleet certificates.

MR. KLEINBARD: We did produce, if you will recall and there was introduced into evidence, I no longer of course remember the exhibit numbers, the policy documents with respect to at least General Motors' fleet program -- fleet certificate program.

THE COURT: Say that again.

MR. KLEINBARD: I say we did introduce into evidence at the preliminary injunction hearing the General Motors' policy or in effect how you obtained a fleet certificate.

THE COURT: That obviously was fairly recent, I assume. That would be of fairly recent vintage.

MR. KLEINBARD: It was of fairly recent vintage, but I don't want to make a representation on the record without going back and looking at the document. We are talking in the case of NABCOR certainly with a situation that was not too long in duration. NABCOR hadn't been on it since prior to 1966. I am not sure you didn't have that period of time covered, but I don't want to rep-

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resent that.

THE COURT: All Mr. Person is trying to do is to get that kind of a document, what we will call in our shorthand the policy kind of documents for fleet certificates going back to '66, right?

MR. PERSON: Yes.

MR. KLEINBARD: I am suggesting if he goes back and looks at the record, he may already have that.

THE COURT: Why don't you, just to save us all time, why don't you look?

MR. KLEINBARD: I'd be glad to, your Honor.

THE COURT: You are in effect saying to me it's already been produced.

MR. KLEINBARD: In whole or in part.

THE COURT: Is this problem directed to all or just two?

MR. PERSON: The fleet certificate program was one of the major reasons for the boycott, so Counts 1 through 3 would be really Ford and GM.

THE COURT: I think subject to -- I would ask Ford and General Motors to do this:

Produce to Mr. Person the policy documents about fleet certificate from '66 on, meaning documents outlining the conditions, nature of the program, any memos or

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correspondence of a general nature, not about specific fleet certificate dealings with specific dealers, unless it involves NABCOR, the plaintiff, but documents outlining the general terms of the program and any documents about any -- any documents about the adoption or changes in these programs.

MR. KLEINBARD: I just wanted to add one thing. As your Honor has phrased it, it comes out much broader than my original statement to you. I cannot say that that kind of material is already in the record nor can I say that it is a simple job for us to collate that material, and I would like to go back to what I said earlier, namely that we don't feel that this belongs in the case, and before we go to that burden of producing all those documents I would ask your Honor to give us the opportunity to be heard on that issue.

THE COURT: I do have this thought. When NABCOR set out to do its business and when they sent out promotional information to these prospective dealers, then they set up a prospectus for some financing, they had very heavy emphasis on the ability to get cars at wholesale or near wholesale prices. One could say that that literature was a little optimistic and in fact they did not have arrangements to get cars on a volume basis at wholesale

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prices. But that is a little besides the point.

The point is that was their scheme, that was their intention and hope. I do think it is probably pretty critical to Mr. Person's taste, this question of whether somebody unlawfully deprived his client of the opportunity to get cars at these low prices. Obviously the auto manufacturers' position is that neither NABCOR nor NABCOR East or any other plaintiff had the right to get cars at wholesale prices from General Motors; certainly not from a franchised dealer who would not be making much if any profit on such a transaction.

But it would seem to me that the issue Mr. Person is raising is if it wasn't unlawful conspiratorial activity which unlawfully prevented him from getting those beneficial price deals. He makes a tremendous emphasis on the fleet program. I would think that in the long run it is probably going to help this case if we can get discovery on that point. I don't mean unreasonable discovery, but I don't regard it as unreasonable to require Ford and GM to produce what I have asked for now; that is, the policy documents describing the program, and also any general memos or correspondence dealing with the program in general terms as to the nature of the program, why the fleet program is of such and such a nature and not another

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nature; that kind of thing.

I would think that in both General Motors and Ford those documents would be fairly readily accessible. I am speaking of general documents, not documents that you have to look at every office all over the United States for.

MR. KLEINBARD: I understand what your Honor is talking about. However, Mr. Person's claim was predicated on a Robinson-Patman violation, as I remember it.

THE COURT: Isn't that part of his Sherman Act claim?

MR. PERSON: Sure.

MR. KLEINBARD: I don't believe so, your Honor.

MR. KAPLAN: I don't see how, your Honor.

5 MR. PERSON: It is monopolizing, with conspiracy between the parties, the dealers.

MR. KAPLAN: Your Honor, we are handicapped here today by a profound lack of information on the part of the plaintiffs about what they are talking about when they talk about fleets, first of all.

THE COURT: I don't think it is so profound. I think we can pretty much sit here and think.

MR. KAPLAN: Perhaps it is not profound, your

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Honor. This fleet problem and the problem of documents relating to fleet is not a new one. The automobile manufacturers or some of them just came through an enormous trial on the issue of how the fleet programs worked in Detroit. In the interests of moving this along General Motors can provide Mr. Person with a copy of the Government's bill of particulars in that case and with access to the documents that the Government annexed.

I am informed, although I have not seen all of the documents that there is a great quantity of documents --

THE COURT: Dealing with what?

MR. KAPLAN: The fleet program of General Motors for the last I don't know how many years in enormous detail. But that to require the production of all "policy documents", or all general documents describing the program or why it's a good thing or why it was adopted, would be an enormous burden.

I would suggest and I have discussed this with the client and I think it is fair to say that the best thing to do here, even if we must go into this before the questio nof whether the count states a cause of action is determined, the most logical thing is to let Mr. Person see what the Government used in Detroit. I am sure it will take him plenty of time to do it and it will give him

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everything he needs.

MR. PERSON: That was a conspiracy to fix prices by the manufacturers. The fleet aspect to it was almost irrelevant. These four Government groups. They weren't buying for resale. They were strictly Government, which just doesn't have a bearing.

THE COURT: I have a hunch that the issues in this case are a lot narrower and simpler than what they were in that Ford case. My understanding to the extent you are making a claim about fleet certificates, my understanding of it is this:

You claim that fleet certificates were made available to certain people such as the leasing companies of the kinds we talked about before. People who would compete with NABCOR. I think we talked about it, the leasing companies who would resell. We narrowed it to that.

You claimed that the fleet certificates were made available to them and not to NABCOR, and that those fleet certificates provided certain benefits which weren't available to NABCOR. I don't understand that you are really attacking as invalid the whole fleet certificate program of Ford or General Motors, or really any part of it; you are saying that you wanted the benefits, or your

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client wanted the benefits of that program, and it wasn't able to have it. It seems to me that what really would basically satisfy the discovery on that point is to get the documents which clearly and thoroughly spell out at the relevant times what the fleet programs of General Motors and Ford were and who was to benefit and what the benefits were to be; who was to qualify, and so forth. And then get any documents, and that brings us right back to the first day's discovery requirements, any documents which would show any deprivation of NABCOR or the plaintiffs of those benefits.

I don't think we have to, the more I think of it, I don't think it is going to serve one bit of purpose in this case to get all the documents going back behind the fleet certificate programs and showing how they originate and so forth. That really isn't an issue.

So I am going to ask General Motors and Ford to provide the documents which show the nature of the fleet programs during the relevant periods, '66 on; and what is required to qualify for those programs, the rights of the beneficiaries to those programs, all the details about what the programs are.

MR. KLEINBARD: And whether they were deprived.

THE COURT: Then on the second point I would

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assume that -- I think it is duplicating, but any documents showing, talking about NABCOR or the plaintiffs and the fleet program. That is about it.

MR. PERSON: May I restate the problem here before you go too far off because you are looking as though we were a leasing company as to whether we have a right to get these documents in that area.

THE COURT: I made no such limitation.

MR. PERSON: Actually what we are claiming is that fleet programs created a situation where the dealers were not allowed by GM or Ford to sell to my clients because my clients did not appear on a list of people who were qualified for fleet treatment. And we are saying that that is an illegal thing for the factory to direct who a dealer may sell to.

What we want to go back is to get the documents which will show the purpose for setting up the fleet program; in other words, as broad as we can to show that the purpose in part for the fleet program was to exclude resellers of automobiles of dealing with dealers who were willing to sell to them.

THE COURT: On that, if there was a document showing that the purpose of a particular program or application of the program was to deprive NABCOR, that

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document has been covered by direction long since given.

MR. PERSON: Correct.

THE COURT: You bring up a more general problem and let's see the likelihood of that. You are saying that the fleet certificate program in a given case might be designed not only to specifically cut out NABCOR but to cut out people like NABCOR. Who are people like NABCOR?

MR. PERSON: There were people called independents or bootleggers or others who would buy cars from dealers and resell them on used car lots, for example, as new cars, or close to that. The fleet program created a situation where dealers felt that they could not sell on a fleet basis to anyone other than an approved purchaser.

Our contention is that we got knocked out by that; others got knocked out by that, and it would be relevant to show that it wasn't just NABCOR --

THE COURT: That claim again, is that part of --

MR. PERSON: We are trying to show that the system took us down along with other people. To the extent that it was designed to do that, I think is relevant to our case. It was designed to prevent competition by setting up a list of dealers, franchised dealers could sell their cars to on a fleet basis.

THE COURT: Was that in your complaint?

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MR. PERSON: That is part of the complaint.

THE COURT: Discovery is a lot of work and we will have a lot of work to do in this case just trying the basic boycott claim. I don't want to have anybody in this room including myself on something that is just a figment of the imagination.

MR. PERSON: The fleet certificate preceded NABCOR, so obviously they didn't set it up for NABCOR. We want to know the purpose.

THE COURT: Is there an allegation in your complaint that covers the point you are making or is this something that is a product of imagination here and now on the spot?

MR. PERSON: No, your Honor, the fleet --

THE COURT: Where is it in the complaint?

MR. PERSON: In the first count.

THE COURT: Where? Is there an allegation of that, does anybody know?

(Pause.)

THE COURT: I am n ot looking for a definition, I am looking for a satisfactory allegation that the fleet programs were designed to illegally cut out classes of car buyers which were not lawfully able to be cut out. Where is it?

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MR. KLEINBARD: Excuse me, your Honor. My recollection is that the allegation in the complaint which appears at the top of page 29 is specifically designed; consistent with the boycott theory --

THE COURT: You mean boycotting NABCOR?

MR. KLEINBARD: That's right. It is refusing to issue the NABCOR fleet certificate numbers permitting volume purchases of new automobules through any dealers franchised by GM or Ford. That is consistent with the theory alleged in the first several causes of action. It was not brought on behalf of the general public; it was brought on behalf of NABCOR and its dealers, its franchisees.

THE COURT: Let us leave it that way. We have one other claim that we dealt with a few minutes ago that we were still trying to find out whether it was embraced in the complaint.

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6 MR. KLEINBARD: Are you talking about the territorial warranty, your Honor?

THE COURT: Right. What I would suggest doing is treating this claim that Mr. Person has just described in the same manner. We will defer granting discovery on it until we see if it is a valid part of the claim. If it is, it's something that can be handled I think in a limited scope of time. In the meantime, let's limit the fleet certificate document discovery to what I have just said.

MR. KLEINBARD: May I ask for one other thing in that connection, your Honor, particularly since we are going to have to come back on this issue with respect to the two items you just mentioned; I'd like to have the date scheduled at which time we could have the opportunity to address ourselves to whether or not this whole fleet certificate issue should remain in the complaint as a Robinson-Patman claim.

THE COURT: It really is impossible for me to do anything until September.

MR. KLEINBARD: Obviously you can only do it when you can do it. But we want and I think you want and everybody wants as much as possible to try what is essential, to try and not just have an accordion-type

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complaint.

THE COURT: We will have further sessions pretrial.

MR. KLEINBARD: If as early as possible we could be advised, then we could have the appropriate people here who are responsible.

THE COURT: Why don't we set a date today?

MR. KLEINBARD: That would facilitate our situation a good deal.

THE COURT: How about Friday, September 20, at 4.00 p.m.?

MR. KLEINBARD: All right, your Honor.

MR. NORFOLK: If I could be heard on behalfof Ford,I will not reiterate the suggestions that were made, but I would say that going through the dealer folders that Mr. Person has produced in terms of our client --

THE COURT: What point is this?

MR. NORFOLK: Back on the question of fleet progress. Mr.Person's almost exclusive if not entire purchases from FordMotor Company were frauds. There is a link in Mercury Division as well. Their programs were separate in this fleet area with separate terms, and so forth. I have been advised by my client that documents that describe the fleet program as it relates to

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Ford automobiles, we have them; it does not take that much difficulty to produce them if your Honor is going to require them. But that same kind of search and collection has not been made in the Lincoln Mercury Division.

In view of the fact that Mr. Person's purchases were primarily of Ford automobiles I would request that we limit it to the Ford Division.

THE COURT: Okay. I know we just touched briefly upon depositions --

MR. KROHLEY: Before moving on to something new, I'd like the time period embraced by the destination charge documents. Are we expected to go back to 1953 to examine documents and produce policy documents with respect to destination charges? Mr. Person seems to think that the only change that occurred was in 1953; I don't know that to be a fact at all, your Honor. There may be a number of changes throughout this 20-year period of time.

THE COURT: I said the last change. The documents that give the immediate background for the current policy. In other words, if the policy that has been in effect since 1966 originated in 1953, I think you have got to go back to '53. Because you wouldn't have anything since. The documents that describe the current

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policy and the documents that describe the change at the time that it came into effect.

How about depositions? Any progress on depositions?

MR. KLEINBARD: We have noticed some depositions, your Honor. I have sent Mr. Person, I don't know whether he received it in the mail or not, but we have noticed seven depositions. We have noticed the depositions of a NABCOR sales manager, Mr. O'Brien, to testify; and six non-party witnesses who are alleged to have been present at a time when some alleged misconduct took place in connection with the boycott.

These are basically out-of-State people and we will have to allow enough time to locate them and subpoena them and have the subpoenas issued out of the respective district courts. Those are now in the works.

THE COURT: I thought at our last hearing Mr. Kaplan told me he still had the questioning of the plaintiffs; it seems to me that you ought to get that behind you.

MR. KLEINBARD: We would like to, your Honor, to do these first as a result of our experience in examining the plaintiffs before, your Honor -- if I don't have to elaborate on why, that is fine.

THE COURT: All right. As long as you are going to move.

MR. KLEINBARD: There are seven notices out as of today.

MR. PERSON: I wanted to have a court order allowing us to record the depositions --

THE COURT: Have you noticed any depositions?

MR. PERSON: No, I have not, your Honor.

THE COURT: Can you give us a list now of the depositions?

MR. PERSON: Not at this moment, I can't.

THE COURT: How many depositions?

MR. PERSON: First of all, we haven't had interrogatories, so we really don't know who the people in the defendants are who we would like to depose.

THE COURT: You have not served any interrogatories?

MR. PERSON: Not at this moment.

THE COURT: What is your plan?

MR. PERSON: That I thought is what we came for. I had scheduled it previously in our memorandum saying that that was after the document production, we wanted to have interrogatories to go into various areas.

THE COURT: When are you going to serve inter-

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rogatories?

MR. PERSON: We could serve them within two weeks, your Honor.

THE COURT: I just have a dread of having interrogatories --

MR. PERSON: No more burdensome than the defendant's interrogatories.

THE COURT: That really doesn't help me. I have a dread of having you serve interrogatories around the 1st of August when I am out in California, and then the defendants have huge objections and there is nobody except the Part I judge or a magistrate to handle those objections until some time in the middle of September.

MR. PERSON: Telephone conference --

THE COURT: And I wonder if we couldn't -- why couldn't you serve your interrogatories sooner than that? Haven't you got them prepared?

MR. PERSON: Not knowing exactly what the scope of the case is, it's been difficult. I have been trying to wait to see what it's been narrowed down to.

THE COURT: You know there is counts 1, 2, 3. That is the guts of the case.

MR. PERSON: I need about a week to do it.

THE COURT: Why don't you serve your inter-

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rogatories?

MR. KLEINBARD: Your Honor, we have given the plaintiff about, I know we ourselves have given him over 800 documents. He ought to know by now the names of the relevant people in our particular organization to depose. So I don't really know why we need the interrogatories in the first place. If he has people he wants to depose, he's had a wealth of material that we have produced since our last sessions here which he can proceed to depose.

Why do we have to have this intermediate set of interrogatories?

THE COURT: Let's do this. I am going to ask you to serve your interrogatories.

MR. PERSON: In the whole case or only counts 1 through 3?

THE COURT: Everything that is now left in the case as you have stated, the real essence of the case despite other allegations is counts 1 through 3. But I would serve it on everything you think is still in the case. This is the 12th, you serve it by the end of the day of the 19th. And then it seems to me that the defendants ought to get, they can look those over quickly and at least in a rough way see the scope and see if they should be objected to, and then if there are objections

13. "Financial Institutions" shall mean the finance companies named in the complaint as defendants, as follows:

a. Associates Discount Corporation
b. C.I.T. Financial Corporation
c. Commercial Credit Corporation
d. General Motors Acceptance Corporation;

and any other financial institutions including banks.

14. "Your Manufacturer" shall mean the Defendant Automobile Manufacturer with which you have a franchise or sales agreement or of which you are a division or subsidiary, or which financed you under its Dealer Development, Dealer Enterprise or Motors Holding program.

15. "Defendant BBB's' shall mean:

a. The Better Business Bureau of Metropolitan New York, Inc.
b. Better Business Bureau of Westchester County
c. Better Business Bureau of Western New York, Inc.
d. National Better Business Bureau, Inc.

16. "Personnel" shall mean all officers, directors, employees, salesmen, agents, attorneys (acting in other than a privileged capacity) and all other persons acting or purporting to act on behalf of the named entity.

Time Period

These interrogatories are to be answered for the period commencing January 1, 1966 and ending April 30, 1973, unless stated to the contrary in a specific interrogatory.

Interrogatories

1. Identify and describe each automobile order sent or otherwise communicated to you by Nabcor or any Nabcor franchisee ("Your Customer"), and as to each such order:

(a) identify the individual who placed the order with you;

(b) identify the individual who received the order;

(c) state the date of your receipt of the order;

(d) state the make and year of the automobile ordered;

(e) state whether you rejected the order, and if so

- (i) identify the individual who rejected or approved the rejection;
- (ii) state the date of such rejection or approval of rejection; and
- (iii) state the date the rejection was communicated to Your Customer and identify the individual;

(f) if you transmitted the order to Your Manufacturer, identify the individual who prepared, approved or forwarded the order to Your Manufacturer;

(g) state the date the order was transmitted to Your Manufacturer;

(h) state the date the car was delivered to you;

(i) state the date the car was first available for delivery to Your Customer;

(j) state whether the order was transmitted to Your Manufacturer as a "fleet", "stock" or "retail" order, and all communications with Your Manufacturer in connection therewith;

(k) identify and describe all communications between you and Your Manufacturer concerning the order, the warranty or Your Customer; and

(l) state whether you applied for a fleet rebate with respect to such order and the results of your application.

2. Identify and describe all other communications by you with Your Manufacturer about Nabcor, any Nabcor franchisee or any Independent Dealer or any car orders or warranty work for customers thereof.

3. Identify and describe all communications among your Personnel (as the term is defined at ¶ 16 of the definitional section hereof) concerning any complaints about Nabcor, any Nabcor franchisee or any Independent Dealer, including any complaints about lost new-car sales, advertising or warranty work.

4. Identify and describe all communications between you and Nabcor or any Nabcor franchisee concerning any actual or prospective business dealings with you, including:

(a) any negotiations or discussions;

(b) any placement, rejection or acceptance of car orders;

(c) any delivery of new cars; and

(d) any performance or rejection of or complaints about warranty work for customers of Nabcor or any Nabcor franchisee.

5. Identify and describe all communications concerning Nabcor, any Nabcor franchisee or any Independent Dealers with any manager, roadman or other employee of any zone, division or district of Your Manufacturer.

6. Identify and describe all communications with Your Manufacturer concerning the status of Nabcor, any Nabcor franchisee or any Independent Dealers as the holder of a fleet certificate or number or as a person entitled to order cars through franchised dealers on a fleet basis.

7. Identify and describe all communications about Nabcor, any Nabcor franchisee or any Independent Dealers between you and:

(a) Any of the following newspaper publishing companies:

(i) The Buffalo Courier-Express, Inc., publisher of the Courier-Express;

(ii) New York News, Inc., publisher of the News;

Time Period

These interrogatories are to be answered for the period commencing January 1, 1965 to the present, unless stated to the contrary in a specific interrogatory.

Interrogatories

1. Identify and describe each communication between Nabcor and GMAC concerning any Nabcor request for a loan of any type or for Nabcor customer financing.

2. Identify and describe each communication between GMAC and General Motors Corporation ("GM") concerning any Nabcor request for a loan of any type or for Nabcor customer financing.

3. Identify and describe each communication between GMAC and Matt Slap Chevrolet, Inc. and between GMAC and Central Penn National Bank (Philadelphia, Pa.) during 1968-9 concerning Nabcor's request for fleet financing.

4. Identify and describe all communications between GMAC and any other persons during 1968-9 relating to Nabcor, any of the other plaintiffs, or the credit of Nabcor or any of the other plaintiffs.

5. Identify each officer, director, employee or advisor of GMAC who participated to any extent in any analysis, consideration, review or rejection of any Nabcor loan requests of any kind or Nabcor request for customer financing.

6. Identify and describe in detail each communication by any officer, director, employee, agent or advisor of GMAC with any other officer, director, employee, agent or advisor of GMAC

about any Nabcor loan requests or Nabcor requests for customer financing.

7. Identify and describe in detail each communication by any officer, director, employee, agent or attorney of GMAC with any defendant or co-conspirator named in the complaint or any other franchised dealer, automobile dealer association, bank or other finance company, newspaper, better business bureau, motor vehicle bureau; federal, state or local agency; or credit bureau about Nabcor, Nabcor East or any other plaintiff.

8. Identify and describe all of your policies for the extension of floor-plan financing or other loans of any kind to automobile dealers.

9. Identify and describe your policy as applied to Nabcor's request for financing, and explain any differences in policy from the policies described in answer to the preceding interrogatory.

10. Identify and describe all communications between GM and GMAC concerning any limitation or other restriction of new-car sales by GM franchised dealers to the area of responsibility assigned to such dealer in his sales agreement with GM.

11. Does GMAC obtain from GM or the GM franchised dealers any description of the dealer's assigned area of responsibility?

12. Identify each person (including any boards or groups) giving advice on a full or part-time basis (including independent contractors) to GMAC about the financing of new cars to be purchased or leased by franchised dealers, leasing companies,

9. "Nabcor" shall mean Nabcor, Inc., National Auto Brokers Corp., U. S. Sales and Leasing, the subsidiaries and predecessors in interest, the present and former officials, executives, officers, employees, agents and all other persons acting or purporting to act on behalf thereof.

10. "Independent Dealers" shall mean any broker or dealer in new automobiles not franchised by the manufacturer, but not including Nabcor or Nabcor franchisees. "Bird dogs" are included within the meaning of the term "Independent Dealers" as used herein.

11. "Bird dogs" shall mean any brokers, dealers or other persons who solicit orders for any franchised dealers.

Time Period

These interrogatories are to be answered for the period commencing January 1, 1966 to the present, unless stated to the contrary in a specific interrogatory.

Interrogatories

1. Identify and describe each written report ("Report") prepared or used by you relating to Nabcor or any Nabcor franchisee.

2. Identify each person to whom a copy of any Report was sent by you, and as to each such person:

(a) identify each Report sent by you;
(b) state the date the Report was sent;
(c) identify who requested or directed that the Report be sent;
(d) identify who sent the Report; and
(e) identify and describe each communication relating to the request or direction that a Report be sent.

3. Identify and describe each communication between the defendant separately answering this interrogatory and:

(a) Louis C. Troise of the New York BBB (as to defendants other than the New York BBB);

(b) Joel A. Dolci of the New York BBB (as to defendants other than the New York BBB);

(c) Van Miller of the National BBB (as to defendants other than the National BBB);

(d) Allan E. Bachman of the National BBB (as to defendants other than the National BBB);

(e) W. Richard Bruner of the Westchester BBB (as to defendants other than the Westchester BBB);

(f) Harold W. Webber of the Buffalo BBB (as to defendants other than the Buffalo BBB);

(g) Charles S. Dewitz of the Buffalo BBB (as to defendants other than the Buffalo BBB);

(h) Gleason Lapey of the Buffalo BBB (as to defendants other than the Buffalo BBB);

(i) Thomas C. Roberts of the Association of Better Business Bureaus International ("International BBB");

(j) Unidentified person or persons of the Akron BBB;

(k) George C. Young of the Cincinnati BBB;

(l) Mr. Ramsey, Vice President of the Cleveland BBB;

(m) Miss Robbins of the Cleveland BBB;

(n) Raymond Rieger of the Dayton BBB;

(o) Hazel Nolan of the Dayton BBB;

(p) John E. Barbiarz of the Delaware BBB;

(q) James E. Baumhart of the Chicago BBB;

(r) Unidentified person or persons of the Pittsburgh BBB; and

(s) Unidentified person or persons of any other Better Business Bureaus or Chambers of Commerce.

4. Identify and describe each complaint received by you about Nabcor or any Nabcor franchisee, and each communication concerning each complaint.

5. Describe in full any investigation by you of Nabcor or any Nabcor franchisee, and identify and describe in full each communication relating thereto.

6. Identify each officer, director, employee or agent of the defendant separately answering this interrogatory who saw or otherwise knew of the existence of the letter dated August 9, 1967 addressed to Louis C. Troise from the Buffalo BBB and accompanying copy of the memorandum, dated July 18, 1967, from the Motor Vehicle Department (the "Motor Vehicle Memorandum"), produced by the New York BBB as document N-34.

7. Identify and describe each communication among your officers, directors, employees or agents or with the Buffalo BBB or any other Better Business Bureau or person concerning the Motor Vehicle Memorandum.

8. Identify each person to whom you sent or showed, or with whom you discussed, any form of Nabcor's franchise agreement, or any part thereof.

9. Identify and describe any changes made by you in any Report resulting from the Motor Vehicle Memorandum, and identify and describe each communication relating to any such change or proposed change.

10. Name each person identified in answer to Interrogatory No. 2 above who received a copy of any report (whether oral or written) on the licensing information contained in the Motor

Vehicle Memorandum, and identify and describe all related communications.

11. Identify and describe all communications by you about Nabcor or any Nabcor franchisee and:

(a) The Buffalo Courier-Express, Inc.;
(b) Bulletin Company;
(c) Call-Chronicle Newspapers, Inc.;
(d) Dayton Newspapers, Inc.;
(e) Dow Jones & Company, Inc.;
(f) Easton Publishing Co.;
(g) The Evening Star Newspaper Company;
(h) Landmark Communications, Inc.;
(i) New York News, Inc.;
(j) The New York Times Company, Inc.;
(k) Newsday, Inc.;
(l) The News-Journal Co.;
(m) Niagara Falls Gazette;
(n) The Plain Dealer (Forest City Publishing Co.);
(o) Westchester-Rockland Newspapers, Inc.;
(p) World Journal Tribune or any predecessors;
(q) The New York Post, Inc.; and
(r) any officer, directors, employees or agents of any other newspaper publisher or of any television station or radio station.

12. Identify and describe each oral or written application for membership (other than document no. N-163 produced by the National BBB) made by Nabcor or any Nabcor franchisee to you or any other Better Business Bureau, and as to each application (including the application represented by document no. N-163) identify and describe all communications relating to the

application or its review, approval or rejection (including communications among your officers, directors, employees and agents).

13. Identify and describe each communication about Nabcor or any Nabcor franchisee with Peter A. Gordon, Executive Vice President of the Greater New York, Long Island and Westchester Automobile Dealers Association, Inc. ("NY Dealers Association"), any other officers, directors, employees or agents of the NY Dealers Association, the National Automobile Dealers Association ("NADA") or any other association of automobile dealers.

14. Identify and describe each communication relating to the (undated) Memorandum from Peter Gordon to Louis Troise, a copy of which was produced by the New York BBB as document no. N-77.

15. Identify and describe (A) all documents; and (B) all communications by you with the NY Dealers Association, the Niagara Frontier Automobile Dealers Association, Inc., the NADA, or any other association of automobile dealers concerning any Independent Dealers.

16. Identify and describe all communications relating to Nabcor or any Nabcor franchisee with:

(a) Associates Discount Corporation;
(b) Bank of Delaware;
(c) C.I.T. Financial Corporation;
(d) Citizens Bank & Trust Co. of Maryland;
(e) Commercial Credit Corp.;
(f) County Trust Company;
(g) First National City Bank;
(h) General Motors Acceptance Corporation or any of the other Affiliated Finance Companies;

p. New Jersey Bank, N.A.

q. Philadelphia National Bank

r. St. Louis Union Trust Co. (interlock with GM)

s. Suburban Trust Company

t. Union National Bank

u. Westbrook Trust Co. and

v. Wilmington Trust Company.

19. "Compensating balance" includes what is considered by you or any of the Banks to be a compensating balance as well as any deposit with any of the Banks or any subsidiary or affiliate thereof in which a gross profit is accrued by any of the Banks or any subsidiary or affiliate thereof and credited to some other transaction between any of such Banks (or subsidiary or affiliate thereof) and the owner or beneficiary of the deposit, but excludes any deposit with any of the Banks (or subsidiary or affiliate thereof) which by its own terms is the whole transaction with such Bank (or subsidiary or affiliate thereof) and therefore has no connection with any other transaction between such Bank and the owner or beneficiary of the deposit.

Time Period

These interrogatories are to be answered for the period commencing January 1, 1965 to the present, unless stated to the contrary in a specific interrogatory.

Interrogatories

1. Identify and describe all of your communications with Nabcor and any Nabcor franchisees including but not limited to all of your communications between Nabcor or any Nabcor franchisee and each of the persons described below in Interrogatory No. 14.

2. Identify and describe all of your communications concerning Nabcor or any Nabcor franchisee with your Affiliated Finance Company, including all of your communications relating to:

(a) fleet certificate applications;

(b) applications for fleet rebates by your Franchisees;

(c) applications for fleet financings;

(d) resales by Nabcor or any Nabcor franchisee; and

(e) lease or use of fleet automobiles by Nabcor or any Nabcor franchisee.

3. Identify and describe all of your communications about Nabcor or any Nabcor franchisee, including all of the communications between you and any of your Franchisees named in the complaint as defendants or co-conspirators, as well as any of the following franchised dealers which are one of your Franchisees:

(a) Colonial Cadillac, of Trenton, N.J.

(b) James M. Sharkey Buick, Inc., of Yonkers, N.Y.

(c) Cunningham Buick, Inc., of Yonkers, N.Y., successor to Sharkey Buick

(d) Herbert Rosenstock, Inc. (Oldsmobile), of New York, N.Y.

(e) Queens City Chevrolet, of Cincinnati, Ohio

(f) Raines Cadillac Co., Inc., of Smithtown, N.Y.

(g) Foy Buick, of Philadelphia, Pa.

(h) Burke Motor Sales (Cadillac), of Wildwood, N.J.

(i) Plachter-Serubo Cadillac, of Philadelphia, Pa.

(j) James Buick, of Ardmore, Pa.

(k) Higgins Oldsmobile-Cadillac, of Doylestown, Pa.

(l) Jerry Biggers (Chevrolet), of Elgin, Ill.

(m) Daniels Cadillac, Inc., of Allentown, Pa.

(n) Northwest Dodge, of Des Plaines, Ill.

4. Identify and describe all of your communications concerning Nabcor or any Nabcor franchisee with any automobile dealers association including but not limited to any of the following:

(a) National Automobile Dealers Association ("NADA")

(b) Greater New York, Long Island and Westchester Automobile Dealers Association, Inc.

(c) Buffalo Automobile Dealers Association (now known as defendant Niagara Frontier Automobile Dealers Association

(d) Dayton Area Automobile Dealers Association

(e) New Jersey Automobile Dealers Association

(e) Connecticut Automotive Trades Association, Inc.

(f) Delaware Automobile Dealers Association

(g) Atlanta Automobile Association

(h) the Association of Buick dealers which met in Philadelphia during the 1st week of February, 1970 with one or more Buick representatives present

(i) the group of Buick, Pontiac and Oldsmobile dealers who met in Philadelphia during June-August, 1969 to discuss costs and to agree that each dealer was to charge a minimum markup of $150 per unit for fleet sales to Nabcor of Pontiacs, Buicks and Oldsmobiles.

5. Identify each meeting of any automobile dealer associations attended in whole or in part by any of your Personnel at which Nabcor, any Nabcor franchisee or any Independent Dealers were discussed, and identify and describe each such discussion.

6. Identify and describe all communications about Nabcor, any Nabcor franchisee or any Independent Dealers between you and:

(a) Any of the following newspaper publishing companies:

(i) The Buffalo Courier-Express, Inc., publisher of the Courier-Express;

(ii) New York News, Inc., publisher of the News;

(iii) The New York Times Company, Inc., publisher of The New York Times;

(iv) Newsday, Inc., publisher of Newsday;

(v) Westchester-Rockland Newspapers, Inc., publisher of The Daily Item, The Daily Times, The Standard-Star, The Daily Argus, The Herald Statesman, The Daily News, The Citizen Register, The Reporter Dispatch, The Journal-News, Review-Press & Reporter, and the affiliated newspaper The Evening Star; and

(vi) any other newspaper publishing companies; and

(b) any of the Defendant BBB's or any other Better Business Bureau;

(c) any motor vehicle bureau or department;

(d) any Financial Institutions (as the term is defined in ¶ 13 of the definitional section hereof);

(e) offices of any attorney general, district attorney, police, consumer affairs bureau or other governmental agency; and

(f) any other person.

7. Identify and describe all communications among any of your Personnel concerning Nabcor or any Nabcor franchisee.

8. Identify and describe each new automobile order sent to you by any of your Franchisees on behalf of Nabcor or any Nabcor franchisee, and as to each such order:

(a) identify the Franchisee who placed the order with you;

(b) identify the individual who received the order on your behalf and identify the zone, region, district or other office at which the order was received;

(c) state the date of your receipt of the order;

(d) state the make and year of the automobile ordered;

(e) state whether you rejected the order, and if so

(i) identify the individual who rejected or approved the rejection;

(ii) state the date of such rejection or approval of rejection; and

(iii) state the date the rejection was communicated to your Franchisee and identify the individual employed by the Franchisee who received notice of the rejection and identify any of your Personnel who communicated the rejection notice;

(f) state whether you accepted the order, and if so

(i) identify the individual who approved the order and state the date of the approval;

(ii) state the date the car was manufactured;

(iii) state the date the car was released for shipment to your Franchisee;

(g) state whether the order was transmitted to you as a "fleet", "stock" or "retail" order, and whether you changed the status of the order in any way;

(h) identify and describe all communications among Your Personnel concerning the order; and

(i) state whether your Franchisee applied for a fleet rebate with respect to such order and the results of any such application.

9. Identify and describe all communications among your Personnel concerning any complaints about Nabcor, any Nabcor franchisee or any Independent Dealer, including any complaints about lost new-car sales, advertising or warranty work.

10. Identify and describe all agreements or other arrangements between you and any other person concerning indemnification as to any liability in connection with this action, or any payment of legal or other expenses in defending this action.

11. Identify and describe all reports made by you from any of your Franchisees, any automobile dealer association or any other person about any new automobiles sold to Nabcor, any Nabcor franchisee or any Independent Dealers.

12. Identify and describe all complaints or criticisms made to you about Nabcor, any Nabcor franchisee, any Independent Dealers or any customers thereof.

13. Identify and describe all statistics supplied by your Personnel to any of your Franchisees, any automobile dealer association or any other person on the dollar amount of advertising placed by any dealer associations or any of your Franchisees in any newspapers, and identify each of your Personnel who supplied the statistics and state the identification of each such communication.

14. Identify each of the following persons:

A. (TO BE ANSWERED BY GM ONLY):

1. James M. Roche, Chairman of the Board;
2. Frederik G. Donner, Chairman of the Board;
3. Edward P. Belcher, Staff Assistant, Office of Chairman;
4. the GM officials in Detroit with whom Mr. Belcher had numerous telephone conversations about Nabcor and a fleet certificate for Nabcor during January, 1968.
5. Pete Williamson, Staff Assistant, Office of Chairman;
6. Mr. Drury, GMAC, New York;
7. Mr. K. C. Womack, Buffalo Chevrolet Zone Manager;
8. Mr. English, Buffalo Chevrolet Zone, Assistant Mgr.;
9. Mr. Lowe, Washington, D.C. Chevrolet Zone Manager;
10. David Spiece, Philadelphia Chevrolet Zone Manager;
11. Jack Douglas, New York Chevrolet Zone Manager;
12. the Buick Zone official in Philadelphia to whom Jack Douglas spoke about Nabcor during 1968;
13. N. M. Karney, New York Regional Director, Fleet Section;
14. the 2 Chevrolet officials or employees in New York, Broadway & 56th St. office, to whom N. M. Karney took Frank Maiorana in January, 1967;
15. Robert M. De Simone, Fleet Manager, Philadelphia Zone;

17. George Ziebout, Foreign Sales Dept., New York,

18. Walter Englert, Fleet Sales, Midtown Chevrolet, NY;

19. Mr. Englert's superior who spoke with Frank Maiorana by telephone during January, 1967;

20. the Zone Manager, Assistant Zone Manager and District Zone Manager for the area covering Ruckle Pontiac who during October, 1966 met with Frank Maiorana at the bar in the Park Sheraton Hotel at 56th and 7th Avenue, New York;

21. the Pontiac factory official who met with Robert Dillon of Ruckle Pontiac at Dillon's home on a weekend in January, 1967, approximately;

22. the 2 Zone Managers for Oldsmobile and Chevrolet who, on separate occasions during 1968, spoke with Moe Cerota of Cerota Chevrolet-Oldsmobile in Elmer NJ about Nabcor;

23. Raymond Kane, GMAC officer in Paterson, NJ;

24. Hank Thomas, GMAC, Philadelphia;

25. Grover Durham, Buick District Manager in Philadelphia;

26. the Buick representatives at the meeting of the association of Buick dealers in the Philadelphia Zone during the 1st week of February, 1970;

27. Eugene Tanz of Katz (?) & Tanz, a public relations firm representing the Buick Zone at the meeting described in the preceding paragraph;

28. the Zone Manager, Roadman and Fleet Manager and other officials who spoke with Rohrer Chevrolet (in Camden, NJ) about Nabcor at Rohrer's office and elsewhere during September, 1970;

29. the Zone Manager, and Roadman for the Cadillac Zone covering the area including Marty Motors of Yonkers, NY who, during April or May, 1968, spoke with Frank Ripperger and John Montabano about Nabcor;

30. the Pontiac Zone representative for Kollman Pontiac in Hightstown, NJ who during August of 1969 spoke with Mr. Kollman about Nabcor;

31. the Pontiac Zone official for Al Wilson Pontiac, located in Hatboro, Pa., who on February 22, 1968 spoke with Mr. Wilson about Nabcor;

32. R. D. Coulter, Manager, Organization & Analysis Department, Pontiac, Michigan;

33. John H. Harwood, National Customer Relations Manager of Pontiac;

34. Mr. B. R. Everett, Pontiac Tax & Insurance Department, Pontiac, Michigan;

35. Vincent A. McCabe, Zone Manager;

36. R. W. Redmond, Buffalo Zone, Zone Service and Parts Manager;

37. C. D. Clark, Pontiac Buffalo Zone, Customer Relations Manager;

38. P. H. Harrington, Pontiac Office, Manager & Car Distribution;

39. John Rock, Director, Fleet & Government Sales Section;

40. Mr. Owens, referred to in letter to N. M. Karney dated 3/29/66;

41. R. M. O'Connor of GM;

42. P. J. Wetzel of GM Public Relations Staff, NY;

43. R. L. Berg, Director, Fleet & Government Sales Section;

44. Chuck Church, Oldsmobile Division, Lansing, Michigan;

45. the Regional Manager who brought Nabcor to the attention of Mr. Church, as stated in 12/14/66(?) memo of a telephone conversation with Mr. Church;

46. James B. Buckland, Office Manager and Products Distributor, Pontiac, Bala Cynwyd;

47. W. J. Brooks, Jr., Pontiac, Michigan, Fleet Sales, Administrative Assistant;

48. Walter Johnson, Pontiac;

49. G. P. Prodromos, Pontiac Fleet Manager, Philadelphia Zone;

50. Carl E. Michael, Pontiac Eastern Region;

51. G. B. Hogan, Pontiac Fleet Sales Dept.;

52. Mr. J. P. Ware, Philadelphia Zone Manager, Pontiac;

53. Mr. L. J. Dupree, Pontiac, Michigan;

54. Mr. Jack E. Simmers, Philadelphia Zone, Office Manager and Car Distributor;

55. Don Miller, Pontiac Zone;

56. W. Johnson, Fleet Dept.;

57. Mr. Gerald J. Burt, Pontiac Philadelphia Zone;

58. J. W. Johnston, Fleet, Pontiac;

59. Mr. L. W. Miller, Accounts Receivable (Pontiac);

60. Richard K. Moberg, Customer Relations Manager, Buick Motor Division, Fort Washington, Pa.;

61. L. D. Robbins, Buick, Flint, Manager; Owner Relations;

62. Richard K. Mobey, Buick Owner Relations Manager:

63. R. W. Jeffers, Buick;

64. James Kurzen, Customer Relations Manager, Pontiac, Philadelphia office;

65. Willis E. Hames, Pontiac, Michigan, Assistant General Service Manager;

66. Mr. J. S. Walker, Pontiac, Michigan;

67. R. M. O'Connor;

68. R. E. Bradley, Dayton, Ohio, Assistant Branch Manager, GMAC;

69. G. F. Kerr, Director, Special Financing, Executive Office;

70. A. K. Pringle, Regional Manager;

71. R. R. Dykstra, Manager, Dayton;

72. R. R. Nelson;

73. S. E. Johnson, Vice President;

74. F. Connolly, Assistant Branch Manager, Philadelphia Branch;

75. D. L. Dooley, Executive Office, Leases, Fleet & Specialist Financing;

76. J. Higgins;

77. V. Jertson, Detroit TEF;

78. Mr. C. McCrary, Manager, Chevrolet Sales Finance;

79. Mr. G. P. Davey, Jr., Manager, Detroit TEF;

80. Mr. J. C. Thedes, GMC legal staff;

81. Mr. E. J. Smith;

82. Mr. W. K. Laughlin, Buick Motor Division;

83. D. E. Nelson, Assistant Finance Manager and Vice President, Executive Office;

84. G. E. Geier, Oldsmobile Division;

85. Mr. A. J. Felton, Vice President;

86. Mr. T. P. Wallace, Resident Comptroller, Flint, Mich.;

87. T. L. Swope, Zone Organization Manager, Buffalo;

88. Mr. Dunham, CM Fleet;

89. R. Lee Courthey, Assistant Manager, Fleet Sales Dept.;

90. J. J. Musselman, Jr., Philadelphia Chevrolet;

91. F. V. Blesse, Detroit TEF;

92. H. L. Busch, Divisional Comptroller;

93. W. Kuck, General Supervisor Accounts Receivable;

94. Mr. W. H. Gordon, Jr., Philadelphia Cadillac Zone, Manager;

95. Hubert B. Dupuis, Zone Produce Distributor, Philadelphia Cadillac Zone;

96. Albert E. Collier, National Distribution Manager for Cadillac;

97. George Frank.

B. (TO BE ANSWERED BY FORD ONLY):

1. Henry Ford, II;

2. Lee Iacocca;

3. Semon E. Knudsen;

4. Nine Stalioni, Fleet Manager, Philadelphia District;

5. Howard W. Cook, Fleet & Leasing, Ford, Dearborn;

6. the Ford representative covering John B. White Ford, Philadelphia, Pa., during September, 1966, who had a conversation with Mr. White about Nabcor on or about September 14, 1966;

7. the Ford District officials in the Philadelphia District who spoke with Tony Swider of Village Ford, Delran, NJ, about Nabcor;

8. the Ford District officials who before 3/17/67 spoke with officials of Tauder Ford of Phoenixville, Pa. about Nabcor;

9. the Ford Zone official who on December 15, 1966 spoke with Housenick of Housenick Motors of Bloomsburg, Pa. about Nabcor orders;

10. Jack Johnson, management official with Ford relating to dealer representatives or dealer development, in the Philadelphia District;

11. the Philadelphia District officials or roadmen who at a Ford meeting spoke with official of Chestnut Ford, Philadelphia, Pa., during 1966-7, about sale of cars to Nabcor;

12. the Ford officials of the Philadelphia District who met on December 13 or 14, 1966 and spoke about Nabcor with the owner of Chestnut Ford of Philadelphia, Pa.

C. (TO BE ANSWERED BY CHRYSLER ONLY):

1. H. C. Graves, Regional Manager, Philadelphia Fleet;

2. W. C. Hanway, Jr., Vice President;

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- -x

NATIONAL AUTO BROKERS CORP., et al., : 70 Civ. 5421A (TPG)

Plaintiffs, : PLAINTIFFS' INTERROGATORIES ADDRESSED TO FIRST NATIONAL CITY BANK

-against- :

GENERAL MOTORS CORPORATION, et al., :

Defendants. :

- -x

TO: Attorneys for Defendant FIRST NATIONAL CITY BANK:

Pursuant to Rule 33 of the Federal Rules of Civil Procedure and the order by Hon. Thomas P. Griesa at the hearing on July 12, 1974 Defendant First National City Bank (hereinafter "Citibank") is hereby required to serve upon the undersigned, within 30 days from the date of service hereof, sworn answers to each of the interrogatories hereinafter set forth.

These interrogatories are continuing interrogatories. If at any time after service of your answers hereto, and prior to the trial of this action, you obtain additional information responsive to any of these interrogatories, you shall, within 30 days, and in no event later than 5 days before trial, serve supplemental sworn answers setting forth such additional information.

As used herein, the term:

1. "Document" includes the original and any copy (regardless of origin) and all drafts of correspondence, memoranda, reports, financial reports, notes, letters, telegrams, messages (including reports, notes and memoranda of telephone conversations and conferences), studies (including market studies), analyses, comparisons, books, magazines, newspapers, booklets, circulars,

bulletins, notices, instructions, minutes and other communications, whether oral or written, including hearsay, inter- and intra-office communications, purchase orders, questionnaires and surveys, charts, graphs, photographs, phonographs or other recordings and other data compilations from which information can be obtained (translated, if necessary, by you through detection devices into usable form).

2. "Identify" or "state the identification of" means:

(a) when used with reference to a natural person, state his or her full name and present or last-known business and residence address;

(b) when used with reference to any entity other than a natural person, state: (i) its full name; (ii) the address of its principal place of business; (iii) if it is a corporation or national association, the jurisdiction under the laws of which it has been organized (if a corporation) and the date of such organization; and (iv) in the case of an entity other than a corporation or national association, the name of its principals;

(c) when used with reference to a document, writing or written communication, state (i) the nature of the document (e.g., letter, contract, memorandum); (ii) its date; (iii) the name and address of its author and each addressee; (iv) its substance; and (v) its present location or custodian; and

(d) when used with reference to an oral communication, (i) state the date on which it occurred; (ii) identify each person who was present when it was made; (iii) state its substance; and (iv) identify each document which refers thereto. In lieu of stating the substance of any document or writing, a copy thereof may be annexed to the answers to these interrogatories.

3. "Person" shall include natural persons, corporations, partnerships, associations, public corporations, municipal corporations, state governments, local governments and other governmental agencies or bodies.

4. "You" or "Your" shall mean the defendant separately answering these interrogatories, its subsidiaries and predecessors in interest, if any, its present and former officials, executives, officers, employees, agents and all other persons acting or purporting to act on behalf of the defendant or subsidiary or predecessor in interest.

5. "Leasing companies" is defined in ¶ 97 of the complaint, at page 20.

6. "Franchised dealers" is defined in ¶ 99 of the complaint, at page 21.

7. "New automobiles" is defined in ¶ 100 of the complaint, at page 21.

8. "Deposit" includes any checking account, other demand deposit, certificate of deposit, interest-bearing account, non-interest bearing account, note, commercial paper or other security of any kind issued by Citibank or any subsidiaries or other affiliates whether or not paying interest.

9. "Compensating balance" includes what is considered by Citibank to be a compensating balance as well as any deposit with Citibank or any subsidiary or affiliate in which a gross profit is accrued by Citibank or any subsidiary or affiliate and credited to some other transaction between Citibank (or subsidiary or affiliate) and the owner or beneficiary of the deposit, but excludes any deposit with Citibank (or subsidiary or affiliate) which by its own terms is the whole transaction with Citibank (or subsidiary or affiliate) and therefore has no connection with any other transaction between Citibank and the owner or beneficiary of the deposit.

10. "Defendant Automobile Manufacturers" shall mean General Motors Corporation, Ford Motor Company, Chrysler Corporation and American Motors Corporation and any of their respective subsidiaries and any predecessors in interest.

11. "Affiliated Finance Companies" shall mean defendant General Motors Acceptance Corporation, Ford Motor Credit Company, Chrysler Financial Corporation and Redisco, Inc. and any subsidiaries or predecessors in interest.

Time Period

These interrogatories are to be answered for the period commencing January 1, 1965 to the present, unless stated to the contrary in a specific interrogatory.

Interrogatories

1. Identify and describe each communication between Nabcor and Citibank concerning any Nabcor request for a loan or for Nabcor customer financing.

2. Identify each officer, director, employee or advisor of Citibank who participated to any extent in any analysis, consideration, review or rejection of any Nabcor loan requests of any kind or Nabcor request for customer financing.

3. Identify and describe in detail each communication by any officer, director, employee, agent or advisor of Citibank with any other officer, director, employee, agent or advisor of Citibank about any Nabcor loan requests or Nabcor requests for customer financing.

4. Identify each person (including any boards or groups) giving advice on a full or part-time basis (including independent contractors) to Citibank about the sale, lease or financing of new cars by any of the Defendant Automobile Manufacturers, franchised dealers, leasing companies, other fleet purchasers or new-car brokers or dealers not franchised by the manufacturer, and as to each such person describe the subject matter of any consultation or advice rendered to Citibank during 1966-7 and identify each communication with respect thereto.

5. Identify each officer, director, employee or agent of Citibank to whom any advice or communication described in answer to the preceding interrogatory was given or made, identifying such advice or communication.

6. Identify each officer, director, employee or agent of any of the Defendant Automobile Manufacturers or Affiliated Finance Companies who discussed with Citibank at any time during 1966 or 1967:

(a) the financing of any (i) franchised dealers; (ii) leasing companies; (iii) other fleet purchasers of new cars; or (iv) retail new-car purchasers;

(b) the amount of deposits maintained or to be maintained with Citibank;

(c) the level of compensating balances to be maintained with Citibank;

(d) the dollar amount of lines of credit established or to be established with Citibank; and

(e) the borrowing from Citibank against lines of credit established with Citibank.

7. Identify each officer, director, employee or agent of any of the Defendant Automobile Manufacturers or Affiliated Finance Companies who had the actual or apparent authority to enter into any agreement with Citibank relating to any of the types of transactions referred to in any of the subparagraphs (a) through (e) in the preceding interrogatory.

8. Identify and describe in detail each communication by any officer, director, employee, agent or attorney of Citibank with any defendant or co-conspirator named in the complaint or any other franchised dealer, automobile dealer association, bank or other finance company, newspaper, better business bureau, motor vehicle bureau; federal, state or local agency; or credit bureau about Nabcor, Nabcor East or any other plaintiff.

9. Identify each officer, director, employee, agent or attorney of Citibank who at any time was a member of the Board of Directors of The Better Business Bureau of Metropolitan New York, Inc. ("New York BBB"), the Better Business Bureau of Westchester County ("Westchester BBB") or the National Better Business Bureau ("National BBB"); or a member of any advisory board of any of these BBB's, or was an advisor or consultant to any of these BBB's relating in whole or in part to the financing of franchised automobile dealers or retail purchasers of new automobiles, and as to each such officer, director, employee, agent or attorney:

(i) state the title and function;

(ii) identify the immediate superior of such person at all times, including his title and function with Citibank;

(iii) state the name of the BBB involved;

(iv) state the position or function with the BBB of such officer, director, employee, agent or attorney;

4. "You" or "Your" shall mean the defendant separately answering these interrogatories, its subsidiaries and predecessors in interest, if any, its present and former officials, executives, officers, employees, agents and all other persons acting or purporting to act on behalf of the defendant or subsidiary or predecessor in interest.

5. "Franchised dealers" is defined in ¶ 99 of the complaint, at page 21.

6. "New automobiles" is defined in ¶ 100 of the complaint, at page 21.

7. "Defendant Automobile Manufacturers" shall mean General Motors Corporation, Ford Motor Company, Chrysler Corporation and American Motors Corporation and any of their respective subsidiaries.

8. "Affiliated Finance Companies" shall mean defendant General Motors Acceptance Corporation, Ford Motor Credit Company, Chrysler Financial Corporation and Redisco, Inc. and any subsidiaries or predecessors in interest.

Time Period

These interrogatories are to be answered for the period commencing January 1, 1965 to the present, unless stated to the contrary in a specific interrogatory.

Interrogatories

1. Identify and describe each communication between you and any of the plaintiffs or any other Nabcor franchisees.

2. Identify and describe each complaint about Nabcor, any other plaintiffs or any other Nabcor franchisees made to you by any of your members, any other franchised dealers or any other person.

3. Identify and describe any investigation by you of Nabcor, any other plaintiffs, Multi-Make Auto Sales, Donald Bolling, Gary Kuhanek or any other Nabcor franchisee.

4. With respect to your report on Nabcor (the "Report") and Nabcor's franchisees contained in your Bulletin No. 659, dated September 29, 1967 (the "Bulletin"):

(a) explain how your first heard of Nabcor or any of its franchisees, identifying each person involved in the communication;

(b) explain how you decided to write the Report on Nabcor and its franchisees, and who participated in the decision to write the Report;

(c) identify each person who participated in writing, reviewing or approving the Report;

(d) identify each person who participated in the decision to circulate the Report;

(e) identify each person to whom the Bulletin was sent and the date(s); and

(f) identify and describe each communication involving the Report.

5. Identify and describe each communication between you and the National Automobile Dealers Association or any other automobile dealer association concerning Nabcor or any of its franchisees.

6. Identify and describe each communication between you and any officer, official or employee of the New York State Department of Motor Vehicles, including (a) A. Montiglio of the White Plains, N.Y. office; and (b) James M. Reddin of the Buffalo, N.Y. office.

7. With respect to the report of the New York State Department of Motor Vehicles on Nabcor dated July 18, 1967:

(a) identify the person who requested or obtained the report;

(b) identify the person from whom the report was obtained and the date the report was obtained;

(c) identify each communication about obtaining or receiving the report;

(d) identify each other communication in connection with the report; and

(e) identify each person to whom the report was sent or described, identifying each person involved in any such communications and the identification of each such communication.

8. With respect to the meetings of your board of directors held on September 18, 1967 and November 20, 1967:

(a) identify each person who participated in preparation of the agenda or approved the agenda for the meeting;

(b) identify each person who recommended or decided that Nabcor should be put on the agenda;

(c) identify each person who attended either of the meetings;

(d) identify and describe each communication about Nabcor at either of the meetings;

(e) identify each person who took attendance at either of the meetings; and

(f) identify and describe any notes taken at either of the meetings, and any minutes of all or any part of either of the meetings.

9. Identify and describe every other meeting of your board or directors or any of your members at which Nabcor or any other plaintiff or any other franchisee of Nabcor was discussed, and as to each such meeting answer subparagraphs (a) through (f) of the preceding interrogatory.

10. With respect to each grand jury or other investigation concerning Nabcor or any of its franchisees in which you participated by subpoena or otherwise:

(a) identify the investigation;

(b) identify each person who testified and state the approximate duration of his or her testimony;

(c) identify and describe any meetings at which such person discussed any matters in anticipation of his or her testimony;

(d) identify and describe any meetings at which such person discussed his or her participation in the investigation or the investigation itself, describing in detail each of the communications which took place at any such meetings; and

(e) identify each document which refers to the investigation or any of the testimony which was given during the investigation.

11. Identify each of the following persons:

(a) Paul Granville, Director;

(b) Your Executive Secretary who on June 26, 1969 testified before the grand jury;

(c) Miss Baker, editor of the Bulletin;

(d) Julie Driscoll;

(e) Mr. Parry;

(f) John Evers;

(g) Brost, possibly a Ford dealer;

(h) Syd, Brost's used car manager;

(i) Your President during September through December, 1967;

(j) each Associate Member who received the Bulletin;

(k) DeLacy, Director

(l) Muck, Director

(m) Johnson, Director

(n) Knoche, Director;

(o) LaMostra, Director;

(p) Reilly, Director;

(q) Tunmore, Director;

(r) Mernan, Director;

(s) Hettinger, Director;

(t) Kirtland, Director;

(u) Tinney, Director;

(v) Frank E. McCarthy, Executive Vice President; and

(w) Albert Bowman, Director;

12. Identify each person who provided any information to you about any of the auto brokers referred to in the Bulletin, and identify and describe each communcation in connection therewith.

13. Identify the customer referred to in the Bulletin (page 1).

14. Identify and describe each communication with the Buffalo Better Business Bureau regarding the Auto Livery incident described in the Bulletin at pages 1-2.

15. Identify and describe each communication by you concerning the unwillingness of local dealers to cooperate with CEX as described in the Bulletin, at page 2.

16. Identify and describe each communication by the editor of the Bulletin assisting in arriving at the conclusion that "We cannot for the life of us think of any reason why a retail dealer would want to get involved in such a scheme. It would only defeat the very purpose for which you are in business. Sure hope YOU all feel the same way."

17. Identify and describe all communications in which any information given to you concerning the statement that "this plan of 'merchandising' is not working well in one area where it has been in operation for some months.", as stated in the Bulletin at page 2.

18. Identify each person who participated in the investigation, approval of the investigation or report on the

investigation of Nabcor (the "Nabcor Report"), a copy of which was produced by you and annexed to a copy of the Bulletin also produced by you.

19. Identify each person who obtained a copy of the Nabcor Report, and identify each person who approved or suggested that the Nabcor Report be circulated to any persons.

20. Identify any communications by you with Industrial Valley Bank concerning Nabcor.

21. Identify the broker discussed in the Nabcor Report who complained to the Better Business Bureau about a customer who demanded one-day delivery and the identity of the (franchised) dealer who was stuck with an automobile as a result of cancellation of an order by the broker. Also, identify the Better Business Bureau and any officer, director or employee thereof with whom the communication was made.

22. Identify each communication concerning the incident described in the preceding interrogatory.

23. Identify each communication between Sheridan Chrysler-Plymouth and you concerning Dabs System, Nabcor or any Nabcor franchisees.

24. Identify any relationship which any officer, director or employee of Sheridan Chrysler-Plymouth had with you on October 25, 1967.

25. Describe how the Federal Auto Systems letter (marked "IV") came into your possession, and identify and describe each communication by you and any other person in connection therewith.

Interrogatories

1. Identify and describe each communication between you and Nabcor or any Nabcor franchisee concerning any advertising sought to be placed by Nabcor or any Nabcor franchisee, and as to each such communication:

(a) state the title and function of each of your officers, directors, employees and agents participating in the communication;

(b) identify any secretary, any assistant and the immediate superior of each person identified in answer to the preceding subparagraph;

(c) identify and describe the type of advertising sought to be placed;

(d) state whether the advertising was accepted or rejected by you;

(e) describe in detail each of your reasons for any rejection of the advertising; and

(f) identify and describe all communications between or among any of your officers, directors, employees or agents concerning each of the communications between you and Nabcor or any Nabcor franchisee.

2. Identify all complaints or criticisms received by you about Nabcor, any Nabcor franchisee or any Independent Dealer from any franchised dealer, newspaper reader or other person (the "Complainant"), and identify and describe all related communications with the Complainant or among any of your officers, directors, employees or agents.

3. Identify and describe each communication about Nabcor or Nabcor East between NYT and Rosenstock Oldsmobile, Inc. or

Ruckle Pontiac Co., Inc., and identify and describe all related communications among NYT officers, directors, employees and agents. (TO BE ANSWERED BY NYT ONLY)

4. Identify each person with whom you communicated during any investigation by you of Nabcor or any Nabcor franchisee and identify and describe all communications with each of such persons and all related communications among any of your officers, directors, employees and agents.

5. Identify and describe all communications about Nabcor or any Nabcor franchisee between you and:

(a) any of the Defendant Automobile Manufacturers;

(b) any of the Affiliated Finance Companies;

(c) any of the following newspaper publishers (other than you):

The Buffalo Courier-Express, Inc.
Bulletin Company
Call-Chronicle Newspapers, Inc.
Dayton Newspapers, Inc.
Dow Jones & Company, Inc.
Easton Publishing Co.
The Evening Star Newspaper Company
Landmark Communications, Inc.
New York News, Inc.
The New York Times Company, Inc.
Newsday, Inc.
The News-Journal Co.
Niagara Falls Gazette
The Plain Dealer (Forest City Publishing Company)
Westchester Rockland Newspapers, Inc.
World Journal Tribune
The New York Post, Inc.

(d) Greater New York, Long Island and Westchester Automobile Dealers Association, Inc., the National Automobile Dealers Association ("NADA"), the Niagara Frontier Automobile Dealers Association (formerly known as the Buffalo Automobile Dealers Association) or any other association of automobile dealers;

(e) any of the following banks and other financial institutions:

Associates Discount Corporation
Bank of Delaware
C.I.T. Financial Corporation
Citizens Bank & Trust Co. of Maryland
Commercial Credit Corp.
County Trust Company
First National City Bank
Suburban Trust Company
Westbrook Trust Co.
Wilmington Trust Company;

(f) any of the Defendant BBB's or the Association of Better Business Bureaus International (the "International BBB");

(g) any of the franchised dealers named in the complaint as defendants or co-conspirators;

(h) any officials, employees or agents of the Motor Vehicle Department of New York State;

(i) the office of any attorney general, district attorney, consumer affairs bureau, United States Attorney, United States Justice Department or other governmental agency; and

(j) any other person.

6. (TO BE ANSWERED BY NYT ONLY) Identify and describe all communications between your Mr. Redding or any other of your officers, directors, employees or agents with "U. S. Attorney General" Dugan during August, 1966 relating to Nabcor, Nabcor East or any Independent Dealers.

7. (TO BE ANSWERED BY NYT ONLY) Identify and describe all communications by you with John O'Brien of the National BBB or any other officer, director, employee or agent of the National BBB or the New York BBB relating to the retraction of Mr. O'Brien, published in Your Newspaper on December 26, 1971, of his statement during September, 1971, that all "automobile brokers" are "crooks".

8. Identify each article published by you about any of the Defendant BBB's or any other Better Business Bureau.

9. Identify and describe all communications about any Independent Dealers between you and any of the persons described in subparagraphs (a) through (j) of Interrogatory No. 5 above.

10. Identify and describe all references in the minutes of your board of directors' meetings or in the minutes of any meetings of any committee of directors relating to Nabcor, any Nabcor franchisee or any Independent Dealer.

11A. (TO BE ANSWERED BY NYT ONLY) Identify each of the following persons:

A. Sam Palmer, Business Opportunities Department;
B. John McCormack, Business Opportunities Dept't;
C. Julius Schmitt;
D. Vincent Redding;
E. A. F. Beermann;
F. J. J. Furey;
G. Mr. Green;
H. Mr. G. Lauterstein;
I. Arthur Hays Sulzberger, Publisher and Chairman of the Board (during 1966);
J. Ivan Netter, National Advertising;
K. Alan(?) Sweetser;
L. Ivan Veit, Executive Vice President;
M. Bill Henke, Business Opportunities Dep't (?);
N. Mr. Fogarty, Business Opportunities Dep't (?);
O. Mrs. Struhs, Business Opportunities Dep't (?);
P. Robert Schuller, Philadelphia office of NYT;
Q. Mr. Johnson, Secretary (or a secretary) of NYT;
R. Harding F. Bancroft, Executive Vice President;
S. Andrew Fisher, Vice President and nominee Director of NYT on Board of Directors of the New York BBB;
T. Mr. Berkland, Business Opportunities Dep't; and
U. All other officers, directors, employees or agents of NYT who served simultaneously on the Board of Directors of the New York BBB or the National BBB.

11B. (TO BE ANSWERED BY NEWS ONLY) Identify each of the following persons:

A. Faye Cannon, Classified Advertising Dep't;
B. Christine E. Krieber;
C. Mr. Donleavy;
D. Mr. Ludwig;
E. Mr. T. Moran; and
F. Bob Turton.

Plaintiff's Statement identifying persons to be deposed

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

NATIONAL AUTO BROKERS CORP., et al., : 70 Civ. 5421A (TPC)

Plaintiffs, : STATEMENT BY PLAINTIFFS IDENTIFYING OFFICIALS

-against- : AND EMPLOYEES OF DEFENDANTS TO BE DEPOSED

GENERAL MOTORS CORPORATION, et al., : BY PLAINTIFFS

Defendants. :

- -x

PURSUANT TO THE ORDER of Hon. Judge Thomas P. Griesa, at the hearing on July 12, 1974, plaintiffs do hereby advise each of the defendants that plaintiffs intend to take a deposition of each of the persons identified or described below in addition to any other officers, directors, employees, agents or attorneys acting or purporting to act on behalf of any of the defendants the identity of whom becomes known to plaintiffs through (i) answers to plaintiffs' interrogatories dated July 19, 1974; (ii) depositions of the persons listed below; (iii) any other discovery; and (iv) any other means.

The list below does not include the officers, directors, employees, agents or attorneys of named defendants not presently defendants or of co-conspirators not named as defendants or other persons not named in the complaint as defendants or co-conspirators. Plaintiffs anticipate they will depose a substantial number of persons falling into these categories, after the persons identified below have been deposed.

GENERAL MOTORS CORPORATION AND GENERAL MOTORS ACCEPTANCE CORPORATION

1. James M. Roche, Chairman of the Board;
2. Frederik G. Donner, Chairman of the Board;
3. Edward P. Belcher, Staff Assistant, Office of Chairman;

4. the officials in Detroit with whom Mr. Belcher had numerous telephone conversations about Nabcor and a fleet certificate for Nabcor during January, 1968;

5. Pete Williamson, Staff Assistant, Office of Chairman;

6. Mr. Drury, New York;

7. Mr. K. C. Womack, Buffalo Chevrolet Zone Manager;

8. Mr. English; Buffalo Chevrolet Zone, Assistant Zone Manager;

9. Mr. Lowe, Washington, D.C., Chevrolet Zone Manager;

10. David Spicce, Philadelphia Chevrolet Zone Manager;

11. Jack Douglas, New York Chevrolet Zone Manager;

12. the Buick Zone official in Philadelphia to whom Jack Douglas spoke about Nabcor during 1968;

13. N. M. Karney, New York Regional Director, Fleet Section;

14. the 2 Chevrolet officials or employees in New York, Broadway & 56th St. office, to whom N. M. Karney took Frank Maiorana in January, 1967;

15. Robert M. De Simone, Fleet Manager, Philadelphia Zone;

16. Walter Gray, New York Pontiac Fleet Manager;

17. George Ziebout, Foreign Sales Dept., New York;

18. Walter Englert, Fleet Sales, Midtown Chevrolet, NY;

19. Mr. Englert's superior who spoke with Frank Maiorana by telephone during January, 1967;

20. the Zone Manager, Assistant Zone Manager and District Zone Manager for the area covering Ruckle Pontiac who during October, 1966 met with Frank Maiorana at the bar in the Park Sheraton Hotel at 56th and 7th Avenue, New York;

21. the Pontiac factory official who met with Robert Dillon of Ruckle Pontiac at Dillon's home on a weekend in January, 1967, approximately;

22. the 2 Zone Managers for Oldsmobile and Chevrolet who, on separate occasions during 1968, spoke with Moe Cerota of Cerota Chevrolet-Oldsmobile in Elmer NJ about Nabcor;

23. Raymond Kane, GMAC officer in Paterson, NJ;

24. Hank Thomas, GMAC, Philadelphia;

25. Grover Durham, Buick District Manager in Philadelphia;

26. the Buick representatives at the meeting of the association of Buick dealers in the Philadelphia Zone during the 1st week of February, 1970;

27. Eugene Tanz of Katz (?) & Tanz, a public relations firm representing the Buick Zone at the meeting described in the preceding paragraph;

28. the Zone Manager, Roadman and Fleet Manager and other officials who spoke with Rohrer Chevrolet (in Camden, NJ) about Nabcor at Rohrer's office and elsewhere during September, 1970;

29. the Zone Manager, and Roadman for the Cadillac Zone covering the area including Marty Motors of Yonkers, NY who, during April or May, 1968, spoke with Frank Ripperger and John Montabano about Nabcor;

30. the Pontiac Zone representative for Kollman Pontiac in Hightstown, NJ who during August of 1969 spoke with Mr. Kollman about Nabcor;

31. the Pontiac Zone official for Al Wilson Pontiac, located in Hatboro, Pa., who on February 22, 1968 spoke with Mr. Wilson about Nabcor;

32. R. D. Coulter, Manager, Organization & Analysis Department, Pontiac, Michigan;

33. John H. Harwood, National Customer Relations Manager of Pontiac;

34. Mr. B. R. Everett, Pontiac Tax & Insurance Department, Pontiac, Michigan;

35. Vincent A. McCabe, Zone Manager;

36. R. W. Redmond, Buffalo Zone, Zone Service and Parts Manager;

37. C. D. Clark, Pontiac Buffalo Zone, Customer Relations Manager;

38. P. H. Harrington, Pontiac Office, Manager & Car Distribution;

39. John Rock, Director, Fleet & Government Sales Section;

40. Mr. Owens, referred to in letter to N. M. Karney dated 3/29/66;

T. J. Owens

41. R. M. O'Connor of GM;

42. P. J. Wetzel of GM Public Relations Staff, NY;

43. R. L. Berg, Director, Fleet & Government Sales Section;

44. Chuck Church, Oldsmobile Division, Lansing, Michigan;

45. the Regional Manager who brought Nabcor to the attention of Mr. Church, as stated in 12/14/66(?) memo of a telephone conversation with Mr. Church;

46. James B. Buckland, Office Manager and Products Distributor, Pontiac, Bala Cynwyd;

47. W. J. Brooks, Jr., Pontiac, Michigan, Fleet Sales, Administrative Assistant;

48. Walter Johnson, Pontiac;

49. G. P. Prodromos, Pontiac Fleet Manager, Philadelphia Zone;

50. Carl E. Michael, Pontiac Eastern Region;

51. G. B. Hogan, Pontiac Fleet Sales Dept.;

52. Mr. J. P. Ware, Philadelphia Zone Manager, Pontiac;

53. Mr. L. J. Dupree, Pontiac, Michigan;

54. Mr. Jack E. Simmers, Philadelphia Zone, Office
    Manager and Car Distributor;

55. Don Miller, Pontiac Zone;

56. W. Johnson, Fleet Dept.;

57. Mr. Gerald J. Burt, Pontiac Philadelphia Zone;

58. J. W. Johnston, Fleet, Pontiac;

59. Mr. L. W. Miller, Accounts Receivable (Pontiac);

60. Richard K. Moberg, Customer Relations Manager,
    Buick Motor Division, Fort Washington, Pa.;

61. L. D. Robbins, Buick, Flint, Manager; Owner Relations;

62. Richard K. Mobey, Buick Owner Relations Manager;

63. R. W. Jeffers, Buick;

64. James Kurzen, Customer Relations Manager, Pontiac,
    Philadelphia office;

65. Willis E. Hames, Pontiac, Michigan, Assistant
    General Service Manager;

66. Mr. J. S. Walker, Pontiac, Michigan;

67. R. M. O'Connor;

68. R. E. Bradley, Dayton, Ohio, Assistant Branch Manager,
    GMAC;

69. G. F. Kerr, Director, Special Financing, Executive
    Office;

70. A. K. Pringle, Regional Manager;

71. R. R. Dykstra, Manager, Dayton;

72. R. R. Nelson;

73. S. E. Johnson, Vice President;

74. F. Connolly, Assistant Branch Manager, Philadelphia
    Branch;

75. D. L. Dooley, Executive Office, Leases, Fleet &
    Specialist Financing;

76. J. Higgins;

77. V. Jertson, Detroit TEF;

78. Mr. C. McCrary, Manager, Chevrolet Sales Finance;

79. Mr. G. P. Davey, Jr., Manager, Detroit TEF;

80. Mr. J. C. Thedes, GMC legal staff;

81. Mr. E. J. Smith;

82. Mr. W. K. Laughlin, Buick Motor Division;

83. D. E. Nelson, Assistant Finance Manager and Vice President, Executive Office;

84. G. E. Geier, Oldsmobile Division;

85. Mr. A. J. Felton, Vice President;

86. Mr. T. P. Wallace, Resident Comptroller, Flint, Mich.;

87. T. L. Swope, Zone Organization Manager, Buffalo;

88. Mr. Dunham, GM Fleet;

89. R. Lee Courtney, Assistant Manager, Fleet Sales Dept.;

90. J. J. Musselman, Jr., Philadelphia Chevrolet;

91. F. V. Blesse, Detroit TEF;

92. H. L. Busch, Divisional Comptroller;

93. W. Kuck, General Supervisor Accounts Receivable;

94. Mr. W. H. Gordon, Jr., Philadelphia Cadillac Zone, Manager;

95. Hubert B. Dupuis, Zone Product Distributor, Philadelphia Cadillac Zone;

96. Albert E. Collier, National Distribution Manager for Cadillac;

97. George Frank;

98. each of the officers, directors, employees or agents who at any time during 1965 through the present was an officer, director, employee, agent or advisor at the same time of any of the following Banks:

    a. American Fletcher National Bank & Trust Co. (interlock with GM);

    b. American National Bank;

    c. Bank of Delaware;

    d. Canal National Bank;

    e. The Chase Manhattan Bank, N.A. (interlocks with GM, Ford and Chrysler);

    f. Citizens Bank & Trust Co. of Maryland;

    g. County Trust Company;

    h. First National Bank of Boston (interlocks with GM and Ford);

    i. First National Bank of Chicago (interlocks with GM and Chrysler);

    j. First National Bank of St. Louis (interlock with GM);

k. First National City Bank (interlocks with GM, Ford and Chrysler);

l. Maryland National Bank;

m. Mellon National Bank & Trust Co. (interlocks with GM and Chrysler);

n. Morgan Guarantee Trust Company (interlocks with GM, Ford and Chrysler);

o. National Bank of Detroit (interlock with GM);

p. New Jersey Bank, N.A.;

q. Philadelphia National Bank;

r. St. Louis Union Trust Co. (interlock with GM);

s. Suburban Trust Company;

t. Union National Bank;

u. Westbrook Trust Co.; and

v. Wilmington Trust Company;

or of any of the other named defendants or co-conspirators.

FORD MOTOR COMPANY:

1. Henry Ford, II;
2. Lee Iacocca;
3. Semon E. Knudsen;
4. Nine Stalloni, Fleet Manager, Philadelphia District;
5. Howard W. Cook, Fleet & Leasing, Ford, Dearborn;
6. the Ford representative covering John B. White Ford, Philadelphia, Pa., during September, 1966, approximately, who had a conversation with Mr. White about Nabcor on or about September 14, 1966, approximately;
7. the Ford District officials in the Philadelphia District who spoke with Tony Swider of Village Ford, Delran, NJ, about Nabcor;
8. the Ford District officials who before 3/17/67 spoke with officials of Tauder Ford of Phoenixville, Pa. about Nabcor;
9. the Ford Zone official who on December 15, 1966 spoke with Housenick of Housenick Motors of Bloomsburg, Pa. about Nabcor orders;
10. Jack Johnson, management official with Ford relating to dealer representatives or dealer development, in the Philadelphia District;

11. the Philadelphia District officials or roadmen who at a Ford meeting spoke with an official of Chestnut Ford, Philadelphia, Pa., during 1966-7, about sale of cars to Nabcor;

12. the Ford officials of the Philadelphia District who met on December 13 or 14, 1966 and spoke about Nabcor with the owner of Chestnut Ford of Philadelphia, Pa.;

13. each of the officers, directors, employees or agents who at any time during 1965 through the present was an officer, director, employee, agent or advisor at the same time of any of the Banks named in ¶ 98 under GENERAL MOTORS CORPORATION AND GENERAL MOTORS ACCEPTANCE CORPORATION at pages 5-6 above or of any of the other named defendants or co-conspirators.

CHRYSLER CORPORATION:

1. H. C. Graves, Regional Manager, Philadelphia Fleet;

2. W. C. Hanway, Jr., Vice President;

3. R. Cook, Detroit, Michigan;

4. J. D. Sparkes, Detroit, Michigan;

5. Dean Mavis, NY Fleet Manager;

6. Don Suhr, NY Fleet Manager;

7. the Fleet Manager of the White Plains Regional Office of Chrysler who during December, 1971 spoke with Frank Maiorana by telephone;

8. the General Manager of Chrysler Manhattan in New York during June-July, 1969;

9. the Sales Manager and salesmen of Chrysler Manhattan in New York who during June-July, 1969 had a meeting about Nabcor and complained to the General Manager of Chrysler Manhattan;

10. the Regional official of Dodge who during December, 1972, approximately, rejected a fleet order for Nabcor submitted to Northwest Dodge of Des Plaines, Ill.;

11. the official of Dodge from the Utica or Syracuse Region who spoke with Dale Strimple in Buffalo about his Nabcor activities and threatened physical harm if Strimple did not cease his Nabcor activities (this official formerly was employed by AMC and was known to Strimple);

12. each of the officers, directors, employees or agents who at any time during 1965 through the present was an officer, director, employee, agent or advisor at the same time of any of the Banks named in ¶ 98 under GENERAL MOTORS CORPORATION AND GENERAL MOTORS ACCEPTANCE CORPORATION

at pages 5-6 above or of any of the other named defendants or co-conspirators.

AMERICAN MOTORS CORPORATION:

1. N. F. Roleson, Manager, Government & Fleet Sales, Detroit, Michigan;

2. Ben W. Wolf, Regional Fleet Manager, of Mountainside, New Jersey;

3. each of the officers, directors, employees or agents who at any time during 1965 through the present was an officer, director, employee, agent or advisor at the same time of any of the Banks named in ¶ 93 under GENERAL MOTORS CORPORATION AND GENERAL MOTORS ACCEPTANCE CORPORATION at pages 5-6 above or of any of the other named defendants or co-conspirators.

BOB BAIN CHEVROLET:

1. Bob Bain;

2. Richard Arnold;

3. John Reno;

4. Marc ____________, to whom Richard Arnold left note "Please factory order";

5. P. Fisher;

6. Richardson, U. S. (?);

7. Ed Simmons, Sales Manager;

8. each fleet manager during the period of any negotiations or dealings with Nabcor or any Nabcor franchisee;

9. each general manager during the period of any negotiations or dealings with Nabcor or any Nabcor franchisee;

10. each officer, director, employee or agent who at any time during 1965 to the present was an officer, director, employee, agent or advisor at the same time of any bank or automobile finance company or any of the other named defendants or co-conspirators.

BANO BUICK, INC.:

1. Clarence Urso, Sales Manager;

2. Alfred Martabano;

3. each fleet manager during the period of any negotiations or dealings with Nabcor or any Nabcor franchisee;

4. each general manager during the period of any negotiations or dealings with Nabcor or any Nabcor franchisee;

5. each officer, director, employee or agent who at any time during 1965 to the present was an officer, director, employee, agent or advisor at the same time of any bank or automobile finance company or any of the other named defendants or co-conspirators.

PAUL BATT BUICK, INC.:

1. Paul V. Batt, President;

2. Collins, J. S. (?), Manager;

3. each fleet manager during the period of any negotiations or dealings with Nabcor or any Nabcor franchisee;

4. each general manager during the period of any negotiations or dealings with Nabcor or any Nabcor franchisee;

5. each officer, director, employee or agent who at any time during 1965 to the present was an officer, director, employee, agent or advisor at the same time of any bank or automobile finance company or any of the other named defendants or co-conspirators.

GLEN CAMPBELL CHEVROLET, INC.:

1. each fleet manager during the period of any negotiations or dealings with Nabcor or any Nabcor franchisee;

2. each general manager during the period of any negotiations or dealings with Nabcor or any Nabcor franchisee;

3. each officer, director, employee or agent who at any time during 1965 to the present was an officer, director, employee, agent or advisor at the same time of any bank or automobile finance company or any of the other named defendants or co-conspirators.

KEM DENGLER CHEVROLET-OLDSMOBILE, INC.:

1. each fleet manager during the period of any negotiations or dealings with Nabcor or any Nabcor franchisee;

2. each general manager during the period of any negotiations or dealings with Nabcor or any Nabcor franchisee;

3. each officer, director, employee or agent who at any time during 1965 to the present was an officer, director, employee, agent or advisor at the same time of any bank or automobile finance company or any of the other named defendants or co-conspirators.

GOTHAM FORD, INC.

1. Murray Kester, General Manager;

2. each fleet manager during the period of any negotiations or dealings with Nabcor or any Nabcor franchisee;

3. each other general manager during the period of any negotiations or dealings with Nabcor or any Nabcor franchisee;

4. each officer, director, employee or agent who at any time during 1965 to the present was an officer, director, employee, agent or advisor at the same time of any bank or automobile finance company or any of the other named defendants or co-conspirators.

GRAND FORD, INC.:

1. Sidney Ofshlag, General Manager;

2. Hank Goldberg;

3. each fleet manager during the period of any negotiations or dealings with Nabcor or any Nabcor franchisee;

4. each other general manager during the period of any negotiations or dealings with Nabcor or any Nabcor franchisee;

5. each officer, director, employee or agent who at any time during 1965 to the present was an officer, director, employee, agent or advisor at the same time of any bank or automobile finance company or any of the other named defendants or co-conspirators.

HAMISTER-GILLOGLY CHEVROLET, INC.:

1. Oliver C. Hamister, Vice President;

2. Elmer Smith, Office Manager;

3. Jim O'Donnell, Salesman;

4. Mr. Gillogly;

5. Mr. Clements;

6. each fleet manager during the period of any negotiations or dealings with Nabcor or any Nabcor franchisee;

7. each general manager during the period of any negotiations or dealings with Nabcor or any Nabcor franchisee;

8. each officer, director, employee or agent who at any time during 1965 to the present was an officer, director, employee, agent or advisor at the same time of any bank or automobile finance company or any of the other named defendants or co-conspirators.

LUBY CHEVROLET CO., INC.:

1. Chester Luby;

2. Joseph A. Alvarez, Mgr., Nat'l Fleet Sales Division;

3. Russell Drowne, Fleet Manager;

4. Leon DiWayne, van sales;

5. each other fleet manager during the period of any negotiations or dealings with Nabcor or any Nabcor franchisee;

6. each general manager during the period of any negotiations or dealings with Nabcor or any Nabcor franchisee;

7. each officer, director, employee or agent who at any time during 1965 to the present was an officer, director, employee, agent or advisor at the same time of any bank or automobile finance company or any of the other named defendants or co-conspirators.

MARK BUICK CORP.:

1. person with initials "K.K.";

2. each fleet manager during the period of any negotiations or dealings with Nabcor or any Nabcor franchisee;

3. each general manager during the period of any negotiations or dealings with Nabcor or any Nabcor franchisee;

4. each officer, director, employee or agent who at any time during 1965 to the present was an officer, director, employee, agent or advisor at the same time of any bank or automobile finance company or any of the other named defendants or co-conspirators.

AL MAROONE FORD, INC.:

1. Frank Downey;

2. each fleet manager during the period of any negotiations or dealings with Nabcor or any Nabcor franchisee;

3. each general manager during the period of any negotiations or dealings with Nabcor or any Nabcor franchisee;

4. each officer, director, employee or agent who at any time during 1965 to the present was an officer, director, employee, agent or advisor at the same time of any bank or automobile finance company or any of the other named defendants or co-conspirators.

MARTY MOTORS CORPORATION:

1. Frank Ripperger, Salesman;

2. John Martabano;

3. L. Kirsch;

4. J. J. Owned(?);

5. Eileen Weir;

6. Tony Strammello;

7. each fleet manager during the period of any negotiations or dealings with Nabcor or any Nabcor franchisee;

8. each general manager during the period of any negotiations or dealings with Nabcor or any Nabcor franchisee;

9. each officer, director, employee or agent who at any time during 1965 to the present was an officer, director, employee, agent or advisor at the same time of any bank or automobile finance company or any of the other named defendants or co-conspirators.

MIDTOWN CHEVROLET, INC.:

1. Walter Englert, Fleet Sales Manager;

2. Jerry Allen;

3. each other fleet manager during the period of any negotiations or dealings with Nabcor or any Nabcor franchisee;

4. each general manager during the period of any negotiations or dealings with Nabcor or any Nabcor franchisee;

5. each officer, director, employee or agent who at any time during 1965 to the present was an officer, director, employee, agent or advisor at the same time of any bank or automobile finance company or any of the other named defendants or co-conspirators.

PARAGON OLDSMOBILE, INC.:

1. Victor Goldsmith;

2. each fleet manager during the period of any negotiations or dealings with Nabcor or any Nabcor franchisee;

3. each general manager during the period of any negotiations or dealings with Nabcor or any Nabcor franchisee;

4. each officer, director, employee or agent who at any time during 1965 to the present was an officer, director, employee, agent or advisor at the same time of any bank or automobile finance company or any of the other named defendants or co-conspirators.

ROBIN FORD SALES, INC.:

1. each fleet manager during the period of any negotiations or dealings with Nabcor or any Nabcor franchisee;

2. each general manager during the period of any negotiations or dealings with Nabcor or any Nabcor franchisee;

3. each officer, director, employee or agent who at any time during 1965 to the present was an officer, director, employee, agent or advisor at the same time of any bank or automobile finance company or any of the other named defendants or co-conspirators.

RUCKLE PONTIAC CO., INC.:

1. Robert Dillon;

2. Earl Stewart;
3. Walter Grimm;
4. each fleet manager during the period of any negotiations or dealings with Nabcor or any Nabcor franchisee;
5. each general manager during the period of any negotiations or dealings with Nabcor or any Nabcor franchisee;
6. each officer, director, employee or agent who at any time during 1965 to the present was an officer, director, employee, agent or advisor at the same time of any bank or automobile finance company or any of the other named defendants or co-conspirators.

GENERAL MOTORS CORPORATION (AS TO RETAIL DIVISIONS, SUBSIDIARIES AND FINANCED COMPANIES):

1. None presently identifiable, other than the persons named or described under MIDTOWN CHEVROLET above.

FORD MOTOR COMPANY (AS TO RETAIL DIVISIONS, SUBSIDIARIES AND FINANCED COMPANIES):

1. Stan Stewart of Circle Ford in Philadelphia;
2. Jack Gogle of Village Ford in Delran, N.J.

NIAGARA FRONTIER AUTOMOBILE DEALERS ASSOCIATION:

1. Paul Granville, Director;
2. the Executive Secretary who on June 26, 1969 testified before the grand jury in Buffalo;
3. Miss Baker, editor of the Bulletin;
4. Julie Driscoll;
5. Mr. Parry;
6. John Evers;
7. Brost, possibly a Ford dealer;
8. Syd, Brost's used car manager;
9. President during September through December, 1967;
10. the President and General Manager of each Associate Member who received the Bulletin published by Niagara Frontier Automobile Dealers Association;
11. DeLacy, Director;
12. Muck, Director;
13. Johnson, Director;
14. Knoche, Director;
15. LaMostra, Director;

16. Reilly, Director;

17. Tunmore, Director;

18. Mernan, Director;

19. Hettinger, Director;

20. Kirtland, Director;

21. Tinney, Director;

22. Frank E. McCarthy, Executive Vice President;

23. Albert Bowman, Director;

24. each other officer and director in office at any time during 1966 or 1967.

25. each of the officers, directors, employees or agents who at any time during 1965 to the present was an officer, director, employee, agent or advisor at the same time of any local bank, newspaper, Better Business Bureau, financial institution providing loans to new-car purchasers, or New York State Department of Motor Vehicles, or of any of the named defendants or co-conspirators.

FIRST NATIONAL CITY BANK:

1. Mr. Giles, formerly Manager and/or Vice President of Citibank at the branch office at 825 Central Avenue, Greenville, New York ("Greenville Branch");

2. Robert Fredericksen, Manager of the Greenville Branch;

3. David C. Samuels, Assistant Manager of the Greenville Branch;

4. David Storm, Assistant Cashier;

5. George Ewald, Sr. Credit Supervisor;

6. Barrett B. Eskell, Assistant Vice President;

7. Mr. Nickerson, Rye Office of Citibank;

8. two male Citibank employees who met with Frank Maiorana at Nabcor's office in the Westchester Townhouse in Yonkers, New York during October or November, 1966, approximately, as described in ¶ 1.6 (pages 2-3) of ANSWERS TO INTERROGATORIES ADDRESSED TO PLAINTIFFS NATIONAL AUTO BROKERS CORP., FRANK MAIORANA AND ANTHONY MAIORANA BY DEFENDANT FIRST NATIONAL CITY BANK, sworn to May 31, 1974, and served on Citibank June 6, 1974 (the "Nabcor Answers to Citibank Interrogatories");

9. the official of Citibank's Broadway & 56th Street, New York, New York branch who met with Frank Maiorana during the spring or summer of 1967, as described in ¶ 1.16 at page 7 of the Nabcor Answers to Citibank Interrogatories;

10. the Citibank officer or employee sitting at a desk in the Greenville or Greenvale Branch who was working on or before June 3, 1974 at the Citibank branch at Getty Square in Yonkers; his name may be Mr. Montimurro;

11. the Citibank officer or employee having an Italian last name (if this person is different from the person described in the preceding paragraph), as described in ¶ 1.20 of the Habcor Answers to Citibank Interrogatories, as the person to whom Habcor may have submitted a written application or other writing at the Greenville or Greenvale Branch;

12. Robert P. Fallon, Regional Vice President (in Westchester County);

13. each account executive in charge of any accounts of General Motors Corporation, Ford Motor Company, Chrysler Corporation, American Motors Corporation, Affiliated Finance Companies (including General Motors Acceptance Corporation) and any other subsidiaries or affiliates;

14. each loan officer in charge of making loans to any of the persons described in the preceding paragraph;

15. each officer, director, employee or agent of Citibank who at any time during 1965 through the present was an officer, director, employee, agent or advisor at the same time of any of the other named defendants or co-conspirators.

THE BETTER BUSINESS BUREAU OF METROPOLITAN NEW YORK, INC.:

1. Louis C. Troise, Automotive Specialist:

2. Joel A. Dolci;

3. each officer, director, employee or agent who at any time during 1965 through the present was an officer, director, employee, agent or advisor of any of the other named defendants or co-conspirators.

BETTER BUSINESS BUREAU OF WESTCHESTER COUNTY:

1. W. Richard Bruner;

2. Joel A. Dolci (same person as No. 2 in preceding list);

3. each officer, director, employee or agent who at any time during 1965 through the present was an officer, director, employee, agent or advisor of any of the other named defendants or co-conspirators.

BETTER BUSINESS BUREAU OF WESTERN NEW YORK, INC.:

1. Harold W. Webber;

2. Charles S. Dewitz;

3. Gleason Lapey;

4 each officer, director, employee or agent who at any time during 1965 through the present was an officer, director, employee, agent or advisor of any of the other named defendants or co-conspirators.

NATIONAL BETTER BUSINESS BUREAU:

1. Van Miller;
2. Allan E. Bachman;
3. each officer, director, employee or agent who at any time during 1965 through the present was an officer, director, employee, agent or advisor of any of the other named defendants or co-conspirators.

THE BUFFALO COURIER-EXPRESS, INC.:

1. the persons who prepared either of the 2 documents of which copies were produced to Plaintiffs, relating to Nabcor and General Auto Sales, Inc.;
2. each officer, director, employee or agent who at any time during 1965 through the present was at the same time an officer, director, employee, agent or advisor of any of the other named defendants or co-conspirators.

NEW YORK NEWS, INC.:

1. Faye Cannon, Classified Advertising Department;
2. Christine E. Krieber;
3. Mr. Donleavy;
4. Mr. Ludwig;
5. Mr. T. Moran;
6. Bob Turton;
7. each officer, director, employee or agent who at any time during 1965 through the present was at the same time an officer, director, employee, agent or advisor of any of the other named defendants or co-conspirators.

THE NEW YORK TIMES COMPANY, INC.:

11 1. Sam Palmer, Business Opportunities Department;
10 2. John McCormack, Business Opportunities Department;
9 3. Julius Schmitt;
4. Vincent Redding;
8 5. A. F. Beermann;
7 6. J. J. Furey;
6 7. Mr. Green;
5 8. Mr. G. Lauterstein;
9. Arthur Hays Sulzberger, Publisher and Chairman of the Board (during 1966);

10. Ivan Netter, National Advertising;
11. Alan(?) Sweetser;
12. Ivan Veit, Executive Vice President;
13. Bill Henke, Business Opportunities Department (?);
14. Mr. Fogarty, Business Opportunities Department (?);
15. Mrs. Struhs, Business Opportunities Department (?);
16. Robert Schuller, Philadelphia office;
17. Mr. Johnson, Secretary (or a secretary);
18. Harding F. Bancroft, Executive Vice President;
19. Andrew Fisher, Vice President (and Director of New York BBB);
20. Mr. Berkland, Business Opportunities Department;
21. Arthur Ochs Sulzberger;
22. each officer, director, employee or agent who at any time during 1965 through the present was at the same time an officer, director, employee, agent or advisor of any of the other named defendants or co-conspirators.

NEWSDAY, INC.:

1. D. Bartels;
2. D. Bethea;
3. M. Burkard;
4. J. Daniels;
5. Mrs. M. Ferris;
6. T. Hurtig;
7. E. Lutz;
8. Miss Michaels;
9. Miss O'Rourke;
10. L. W. Seaman, Assistant Classified Manager;
11. D. Targe;
12. Ed G. Warren;
13. each officer, director, employee or agent who at any time during 1965 through the present was at the same time an officer, director, employee, agent or advisor of any of the other named defendants or co-conspirators.

WESTCHESTER ROCKLAND NEWSPAPERS, INC.:

1. William Nicol, Assistant Director, Classified Advertising;

2. Veccio Cuzza;

3. Stephens ("serviced by");

4. Aaron T. Sullivan, Jr., Assistant Director, Classified Advertising;

5. Miss Olin, ad taker;

6. Lee (which appears at bottom of contract information form for Nabcor East, for contract signed 3/27/69);

7. each officer, director, employee or agent of Westchester Rockland Newspapers, Inc. who at any time during 1965 through the present was at the same time an officer, director, employee, agent or advisor of any of the other named defendants or co-conspirators.

Dated: July 25, 1974.

Carl E Person
Carl E. Person

Attorney for Plaintiffs
Office & P. O. Address:
132 Nassau Street
New York, New York 10038

Tel. No.: (212) 349-4616

TO: All Attorneys on Attached List.

Order to conduct depositions by
tape recorder

FILED
AUG 1 1974
S. D. OF N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---x

NATIONAL AUTO BROKERS CORP., et al. :

Plaintiffs, :

-against- :

GENERAL MOTORS CORPORATION, et al., :

Defendants. :

---x

70 Civ. 5421A (TPG)

ORDER

MICROFILM
AUG 1 '74

Plaintiffs having moved for an order, pursuant to Rule 30(b)(4), Fed. R. Civ. P., permitting them to conduct depositions before trial at which the testimony would be recorded by electronic recording equipment rather than by stenographic means, and the Court having heard arguments of counsel, it is

ORDERED, that the motion be and it hereby is granted upon the terms and conditions hereinafter set forth:

1. Each witness shall be first duly sworn by an officer authorized to administer oaths under the laws of the state in which the deposition is conducted, but there shall be no need for the officer further to attend upon or be present at the conduct of the deposition.

2. The depositions shall be recorded simultaneously by two tape recording devices, one of which may be operated by or under the supervision of the attorney for the plaintiffs and one of which may be operated by or under the supervision of attorneys for the defendants. All recording equipment shall be furnished at plaintiffs' expense.

543

3. The tape recording devices employed shall be such as to reproduce in distinguishable manner the voices of the witness and of the attorneys for the parties.

4. One of the tapes or cassettes upon which the testimony of the witness is recorded shall be retained by the attorney for the plaintiffs and the other shall be retained by the attorneys for the defendants, subject to the provisions hereinafter specified.

5. The testimony of the witness shall be transcribed into typewritten form by any person or party selected by the attorney for the plaintiffs.

6. Within 15 business days of the date of the conclusion of the examination of each witness or, if the examination of a witness continues for more than one day, within 15 business days of the conclusion of each day's examination, the attorney for the plaintiff shall deliver without charge to the attorneys for each of the defendants a typewritten transcript prepared from the tape recording of said deposition.

7. In the event that attorneys for the defendants do not object to the accuracy or completeness of the typewritten transcript served upon them within 7 business days of receipt thereof, said transcript shall be submitted to the witness for execution in accordance with Rule 30(e), Fed. R. Civ. P.

8. In the event that attorneys for the defendants object to the accuracy or completeness of the typewritten transcript served upon them, they shall notify the attorney for the plaintiff of such objections within 7 business days of their receipt of the typewritten transcript by serving a notice of objections to the transcript.

9. In the event of such a dispute, the attorneys for the parties shall meet within 5 business days of the service of a notice of objections and attempt to resolve said dispute by reference to the tapes or cassettes upon which the deposition was recorded.

10. If the attorneys for the respective parties resolve the dispute and such resolution requires any changes in the typewritten transcript, the same shall be made by retyping the page or pages which require such correction.

11. The obligation to retype any page or pages of the original transcript shall be upon the attorney for the plaintiff.

12. Not less than one copy of each corrected page shall then be served by the attorney for the plaintiff upon the attorneys for each defendant.

13. In the event that counsel are unable to resolve a dispute with respect to the completeness or accuracy of a transcript within 12 business days after the receipt thereof by the attorneys for the defendants, either party may thereafter move this Court for an order resolving the dispute. In the event that the Court shall order one or more changes in said transcript, then the attorneys for the plaintiffs shall cause the pages upon which such changes are to be made to be retyped and shall serve the retyped pages upon the attorneys for each defendant.

14. Following the completion of corrections to the transcript, whether by agreement of the parties or by action of the Court, the transcript shall be submitted to the witness for

execution in accordance with Rule 30(e), Fed. R. Civ. P.

15. Upon execution of the transcript by the witness, the executed transcript may be filed with the Clerk of the Court and used in the same manner and to the same extent as a transcript of a deposition recorded by stenographic means.

16. Should the witness fail to execute and cause to be delivered to the attorneys for plaintiff the transcript of the deposition as finally resolved, a copy of the corrected typewritten transcript may be filed with the Clerk of the Court and the same may be used in the same manner and to the same extent as a transcript of a deposition which has been recorded by stenographic means, subject to the limitations contained in Rules 30 and 32, Fed. R. Civ. P.

17. Counsel for each party shall preserve their respective tapes or cassettes upon which the deposition had been recorded until the transcript of the deposition has been executed and returned to counsel for plaintiff or until the filing of the corrected typewritten transcript, whichever first occurs.

18. Typewritten transcripts of any depositions recorded by non-stenographic means shall be used in lieu of tapes or cassettes in all proceedings before this Court, both at trial and before and after trial, except as provided in paragraph 13 hereof.

Dated: New York, New York
July 31, 1974

Thomas P. Griesa
U. S. D. J.

Consented to:

Carl E. Person
Carl E. Person
Attorney for Plaintiffs

Plaintiffs' Notice of Deposition

SCHEDULE A

Name of Officer or Employee of Citibank to Testify on Behalf of Citibank	Date and Time
The senior account executive in charge of accounts of General Motors Corporation, General Motors Acceptance Corporation, Ford Motor Company, Ford Motor Credit Company, Chrysler Corporation, Chrysler Financial Corporation, American Motors Corporation and Redisco, Inc. at any time during July, 1966 through June, 1967	August 15, 1974 10:00 a.m. and continuing August 15, 1974 2:00 p.m. and continuing
The senior loan officer at any time during July, 1966 through June, 1967 in charge of making loans to any of the persons described in the preceding paragraph	August 16, 1974 10:00 a.m. and continuing August 16, 1974 2:00 p.m. and continuing
Each officer, director, employee or agent of Citibank who at any time during July, 1966 through June, 1967 was an officer, director, employee, agent or advisor at the same time of any of the named defendants or co-conspirators in this action	August 19, 1974 10:00 a.m. and continuing August 19, 1974 2:00 p.m. and continuing
W. Witt, author of the memorandum on Nabcor dated August 31, 1966	August 21, 1974 10:00 a.m.
Mr. Nickerson, Rye Office of Citibank	August 21, 1974 2:00 a.m.

SCHEDULE A (Continued)

Name of Officer or Employee of Citibank to Testify on behalf of Citibank	Date and Time
The two male employees of Citibank who met with Frank Maiorana at Nabcor's office in the Westchester Townhouse in Yonkers, N.Y. during October or November, 1966, approximately (as further described on page 14 of STATEMENT BY PLAINTIFFS IDENTIFYING OFFICIALS AND EMPLOYEES OF DEFENDANTS TO BE DEPOSED BY PLAINTIFFS, dated July 25, 1974, incorporated herein by reference	August 23, 1974 10:00 a.m.
Barrett B. Eskell, Assistant Vice President	August 23, 1974 2:00 p.m.
George Ewald, Sr. Credit Supervisor	August 26, 1974 10:00 a.m.
David Storm, Assistant Cashier	August 26, 1974 2:00 p.m.
Robert P. Fallon, Regional Vice President (in Westchester County)	August 27, 1974 10:00 a.m.
Robert Fredericksen, Greenville Branch Manager	August 27, 1974 2:00 p.m.
Mr. Giles, formerly Manager and/or Vice President of the Greenville Branch	August 30, 1974 10:00 a.m.
David C. Samuels, Assistant Manager of the Greenville Branch	August 30, 1974 2:00 p.m.
Mr. Montimurro of the Greenville Branch	September 3, 1974 10:00 a.m.
The officials of Citibank's Broadway & 56th Street (New York, N.Y.) branch who met with Frank Maiorana during the spring or summer of 1967, as described in ¶ 1.16 at page 7 of the Nabcor Answers to Citibank Interrogatories, incorporated herein by reference	September 3, 1974 2:00 p.m. and continuing

Plaintiffs Notice of Deposition

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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NATIONAL AUTO BROKERS CORP., et al. : 70 Civ. 5421A (TPG)

Plaintiffs : NOTICE OF DEPOSITION WITH REQUEST TO PRODUCE DOCUMENTS

-against- :

GENERAL MOTORS CORPORATION, et al. :

Defendants. :

- -x

PLEASE TAKE NOTICE that, pursuant to Rules 30 and 34 of the Federal Rules of Civil Procedure and the order of Hon. Thomas P. Griesa on July 12, 1974 permitting plaintiffs to use audio recording devices during the taking of depositions, the undersigned shall take the deposition upon oral examination of defendants GENERAL MOTORS CORPORATION ("GM") and GENERAL MOTORS ACCEPTANCE CORPORATION ("GMAC") by the officers and employees described in Schedule A hereto at the offices of Carl E. Person 132 Nassau Street, New York, New York, 4th floor Room 424, at the dates and times listed thereon before officers duly authorized to administer oaths. You are invited to attend and cross examine.

PLEASE TAKE FURTHER NOTICE that defendants GM and GMAC shall produce for inspection and copying at the offices of the undersigned no later than Friday, September 6, 1974 at 4:00 P.M. each document the description of which is called for by

(1) Plaintiffs' Interrogatories Addressed to Defendants General Motors Corporation, Ford Motor Company Chrysler Corporation and American Motors Corporation, dated July 19, 1974;

(2) Plaintiffs' Interrogatories Addressed to Defendant General Motors Acceptance Corporation, dated July 19, 1974; or

(3) Plaintiffs' Interrogatories Addressed to Each of the Defendant Franchised Dealers and to GM and